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Supreme Court, U.S.
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No. 07-144

IN THE

Supreme Court of the United States

JEANNETTE A. BISNO AND ROBERT H. BISNO, INDIVIDUALLY; AND DOES 1 THROUGH 25, INCLUSIVE, PETITIONERS

v.

NORTH BEVERLY PARK HOMEOWNERS ASSOCIATION, INC., A CALIFORNIA NON-PROFIT CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A state trial court judge, after a non-jury trial, issued a permanent injunction that was appealed on an interlocutory basis through a state's appellate system. Upon remittitur and before entry of any final judgment, the civil litigant aggrieved by the injunction learned that the trial judge was under state charges for removal from the bench on the ground of mental incompetence for which there was some evidence this condition had arisen prior to conclusion of the original bench trial. The questions presented are:

1. Whether a party to a civil non-jury trial is entitled under the Due Process Clause of the Fourteenth Amendment to a mentally competent judicial officer, and if so, whether the contours of federal due process require, at a minimum, an appropriate mechanism for determining when mental disease may have impaired such judicial officer.

2. Whether a party aggrieved by a court order likely tainted by mental incapacity of a judicial officer, is entitled to an opportunity to seek evidence to establish the time of the onset of the mental disease, and, if so, what type of discovery process protects and balances the due process rights of the civil litigant with the privacy rights of the judicial officer and his or her family.

3. Whether the order below, on a second interlocutory appeal over the disputed injunction order, is final for the purposes of review under 28 U.S.C. § 1257(a).

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OPINIONS BELOW

The order of the California Supreme Court (App., *infra*, 34a)[1] denying the petition for review and request for de-publication of the opinion of the court of appeal is reported at 2007 Cal. LEXIS 5153. The opinion of the California Court of Appeal disposing of the second interlocutory appeal (App., *infra*, 1a-31a) is reported at 147 Cal. App. 4th 762; 54 Cal. Rptr. 3d 644; 2007 Cal. App. LEXIS 187. The opinion of the California Superior Court for Los Angeles County (App., *infra*, 32a-33a) denying dissolution of the permanent injunction and request for limited discovery regarding the mental incapacity of the trial judge is unreported.

JURISDICTION

The judgment of the Court of Appeal of California, Second Appellate District, was entered on February 13, 2007. The Court of Appeal denied a timely petition for rehearing on March 2, 2007. On May 16, 2007, the Supreme Court of California denied a petition for review and a request to de-publish the opinion of the Court of Appeal. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides in relevant part:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

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[1] The Appendix to this Petition will be cited hereinafter as "(App., *infra*, __a)."

STATEMENT

This case raises important issues regarding the scope of the constitutional due process right to a fair tribunal: whether a judge sitting as the trier of fact must be mentally competent and what discovery is available to a litigant to show that his or her judge was, in fact, not. Furthermore, as the facts in this case illustrate, sometimes trial and appellate courts are loathe to sufficiently protect the constitutional right to a fair tribunal when to do so requires retrial or other significant unwinding of the court proceedings to properly correct the defect triggered by the mental incapacity of a judicial officer. However, the precedents of this Court establish that due process is best protected when any question of unfairness is removed by retrial or reconsideration of decisions made by judicial officers that may have been tainted by unfairness. That is precisely what would cure the infirmities of what happened in the courts below in this case.

Appellants, Jeanette and Robert Bisno ("the Bisnos") purchased a lot and constructed a single-family home in a planned gated community of multi-million dollar homes located in the City of Beverly Hills, California known as "North Beverly Park." (Appellant's Appendix at p. 410.)[2] Respondent, North Beverly Park Homeowners Association ("the Association"), filed an action against the Bisnos for damages and injunction asserting that the Bisnos were threatening to install an abstract sculpture and gates for their motor court without approval from the Association under the Declaration of Covenants, Conditions and Restrictions of the community. (A.A. at pp. 1-163.)

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[2] Hereinafter citations to the Appellant's Appendix containing the appellate record before the California Court of Appeal shall be "(A.A. at p. ____)."

A. Original Trial Court Injunction and Appeal

The case was assigned to Hon. Rodney E. Nelson, a Los Angeles County Superior Court Judge, sitting in Department 46. (A.A. at p. 400.) Initially, on June 11, 2002, Judge Nelson granted a preliminary injunction barring construction of the sculpture and gates. (A.A. at pp. 389-391.) Then, a year later, on October 31, 2003, in response to Bisnos' motion to dissolve the preliminary injunction, Judge Nelson changed his mind and lifted the preliminary injunction, allowing the Bisnos to install the sculpture and gates subject to final decision at trial. (A.A. at p. 392.) Then, after a trial conducted in March/April 2004, Judge Nelson issued a statement of intended decision that expressly apologized to the Bisnos and their counsel and changed his mind again to impose a permanent injunction. (A.A. at pp. 394-397.) On April 29, 2004, Judge Nelson issued the order granting the permanent injunction against the Bisnos that required them to remove the sculpture and motor court gates and to obtain Association permission for any new installation. (A.A. at pp 400-404.)

The Bisnos prosecuted an interlocutory appeal of the grant of the permanent injunction through the California appellate system. (A.A. at p. 412.) Ultimately, the California Supreme Court denied review of the Court of Appeal's affirmance of the trial court injunction order and the remittitur was issued on October 13, 2005. (A.A. at pp. 439, 440.)

B. Motion Judge's Refusal to Dissolve Injunction

As the interlocutory appeal was returning to the trial court, on October 17, 2005, the Bisnos' counsel, as a result of a lunch conversation with another attorney at a law seminar, first learned that Judge Nelson, while still the assigned judge

of Department 46, had been placed on administrative leave on suspicion that he suffered a degenerative brain disease which impaired his mental capacity. (A.A. at pp. 442, 457, 458; Reporter's Transcript at p. 9.)[3] The Bisnos' counsel's later investigation showed that over 50 cases of Judge Nelson were under reassignment or reconsideration due to the length of time the Judge may have been incapacitated by disease and continued to serve on the bench. (A.A. at p. 603, R.T. at p. 11.)

California has a judicial disqualification statute that requires a judge to step aside if ". . . by reason of permanent or temporary physical impairment, the judge is unable to properly perceive the evidence or is unable to properly conduct the proceeding. . ." California Code of Civil Procedure § 170.1(a)(7) or ". . . if the judge believes his or her recusal would further the interests of justice . . . ." California Code of Civil Procedure § 170.1(a)(6)(A).

Further investigation by the Bisnos' counsel revealed other cases in Department 46 that had statements of disqualification filed against Judge Nelson under section 170.1(a)(7) of the Code of Civil Procedure. (A.A. at pp. 515-609.) On November 30, 2005, before any entry of a formal final judgment, the Bisnos filed a statement of disqualification in this case that alleged that Judge Nelson suffered from lack of memory and concentration when he sat as trier of fact the previous year at the bench trial. (A.A. at 441-445.) On the basis of the allegations contained in the statement of disqualification, the Bisnos also filed a motion to dissolve the injunction granted by Judge Nelson. (A.A. at 446-464.)

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[3] Hereinafter citations to the Reporter's Transcript of Motion Judge Hearing, dated January 26, 2006, shall be "(R.T. at p. ___)."

A few weeks later, on December 16, 2005 counsel in another Department 46 case, *Harris v. Investor's Business Daily, Inc.*, Case No. BC 269313, filed a similar statement of disqualification in which counsel set forth citations of incidents that supported his allegation that Judge Nelson was suffering from mental impairment since the beginning of 2004. (A.A. at pp. 586-592.) This was evidence that at the same time as the bench trial and order of injunction was issued in the Bisnos' case other attorneys with cases in Department 46 had observed odd behavior by Judge Nelson that suggested mental capacity problems. (A.A. at pp. 515-579, 524-535, 587-591.) Bisnos' counsel filed a supplement to the Motion to Dissolve the Injunction by offering the *Harris* statement of disqualification and others as evidence that Judge Nelson was likely mentally incapacitated at the time of trial and issuance of the injunction. (A.A. at pp. 580-609; *see especially* pp. 586-590 for details of odd behavior of Judge Nelson all during 2004.)

The Bisnos personally served a copy of the statement of disqualification in their case on Judge Nelson at his home where he was on administrative leave and upon Judge Nelson's legal counsel who was defending him in proceedings before the California Commission on Judicial Performance to remove him from the bench. (A.A. at pp. 494, 521, 576-577.) Neither Judge Nelson nor his counsel responded in any way to the Bisnos' statement of disqualification. (A.A. at p. 521.) Under the California judicial disqualification statute, the failure of the judge to respond or defend a statement of disqualification results in the allegations contained therein being deemed true. California Code of Civil Procedure §170.3(c)(4); *Urias v. Harris Farms, Inc.*, 234 Cal.App.3d 415, 421-422 (1991). To the best knowledge of the parties, Judge Nelson did not respond to any of the statements of disqualification filed against him in his Department 46 cases.

In the *Harris v. Investor's Business Daily* case, the Los Angeles Superior Court routinely reassigned the case to a new trial judge while awaiting an interlocutory appeal in that case to be remitted from the Court of Appeal. In the Bisnos' case, the Los Angeles County Superior Court assigned a new judge who heard and decided the pending motion to dissolve the injunction, supporting requests for judicial notice, and a pending motion by the Association for attorneys' fees.

Bisnos' Motion to Dissolve the Injunction was based upon the failure of Judge Nelson to file a response and several requests to take judicial notice of the existence of the Commission on Judicial Performance proceedings against Judge Nelson on the ground of degenerative brain disease (Alzheimer's) and statement of disqualification filings in other cases before Judge Nelson. (A.A. at pp. 446-447.)

The new judge, referred to as the "Motion Judge" in the Court of Appeal opinion below, refused to hold the allegations of mental incapacity at the time of trial to be deemed admitted as a result of Judge Nelson's failure to respond, and refused to grant judicial notice of the stated reasons in public notification of the proceedings of the Commission on Judicial Performance to remove Judge Nelson for degenerative brain disease, or the content of other statements of disqualification proffered from other cases in Department 46. (R.T. at pp. 3-6, 8, 19-20.) On this basis, the Motion Judge concluded there was no admissible evidence establishing that Judge Nelson was mentally incompetent at the time of trial.

Although requested in the notice of the Motion to Dissolve the Injunction and during oral argument, the Motion Judge also denied requests of the Bisnos' counsel to allow limited discovery of the judge's family members and his medical care provider to determine when the mental disease was diagnosed or manifested. (A.A. at p. 455; R.T. at pp. 9,

20.) After refusing to admit most of the proffered evidence and denying any right of limited discovery to obtain more evidence, the Motion Judge concluded there was no admissible evidence before him that Judge Nelson was mentally incompetent at the time of trial, and despite specific assertions of the Bisnos' counsel that a denial of a limited discovery right would deny the Bisnos due process of law, the Motion Judge denied the Motion to Dissolve the Injunction. (R.T. at pp. 3-6, 8, 19-20.)

In denying the motion, the Motion Judge indicated he was loath to weigh the request to take discovery against the privacy rights of the judge and family:

> "Motion is denied in every respect. There's no precedent for the type of motion we have here. There's no evidence in any support, no admissible evidence in support of the motion, and there's no precedent nor support for the request to take discovery. It's not raised. Certainly sounds like it would be a violation of privacy rights. A whole can of worms we don't even have to open." (R.T. at p. 20.)

Thereafter, the Motion Judge ruled on other pending matters in the case and the hearing concluded. (R.T. at p. 22-23.)

C. Court of Appeal Oral Argument and Opinion

The Bisnos timely prosecuted a second interlocutory appeal of the trial court's refusal to dissolve the injunction. In briefing the case for the California Court of Appeal, Second Appellate District, neither of the parties addressed the issue of whether the prior issuance of the permanent injunction was a final judgment in the case. (Appellants'

Petition for Rehearing at p. 5.)[4] At oral argument before the Court of Appeal, the issue of whether the permanent injunction was a final judgment was raised for the first time by that court. (App.Pet.Reh. at p. 5.) Bisnos' counsel pointed out that neither of the parties had briefed the issue because both appeals in the case had been prosecuted under California's appellate statute that provides for interlocutory appeal of an order "granting or dissolving an injunction, or refusing to grant or dissolve an injunction" (California Code of Civil Procedure § 904.1(a)(6)). (App.Pet.Reh. at p. 5.)

On February 15, 2007, the Court of Appeal filed and published its decision, *North Beverly Park Homeowners Assoc. v. Bisno*, 147 Cal.App.4th 762, 765 (2007). Despite the lack of a final judgment ever having been entered in the trial court, the Court of Appeal characterized the Bisnos' filing upon first learning about Judge Nelson's condition as an effort "to avoid the permanent injunction by filing a statement of disqualification against the trial judge . . . ." (App., *infra* 3a.) The Court of Appeal opinion distinguished California case law on the basis of whether a statement of disqualification is filed before or after final judgment, and because the statutory scheme provides for no procedure after final judgment, the Court concluded that the Legislature never intended the judicial disqualification statute to apply following final judgment. (App., *infra* 7a, 11a.) Based upon its declaration that the entry of the permanent injunction was apparently a final judgment, the Court of Appeal concluded that the disqualification statute could not be invoked and the failure of Judge Nelson to respond was not evidence of his mental incapacity at the time of the non-jury trial. (App., *infra* 11a.)

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[4] Hereinafter citations to Appellant's Petition for Rehearing shall be "(App.Pet.Reh. at p. ____)."

The Court of Appeal also reviewed the requests for judicial notice of the public notifications of the proceedings of the Commission on Judicial Performance and the statements of disqualification filed in other cases in Department 46. (App., *infra* 20a-22a.) After affirming the Motion Judge's decision to not grant judicial notice of the content of those evidentiary submittals, the Court of Appeal addressed the issue of whether a litigant has a right to conduct discovery regarding when a judge may have exhibited signs of mental impairment or was diagnosed with such impairment. (App., *infra* 27a-28a.) The Court of Appeal stated its standard for obtaining a right to conduct such discovery as follows:

> "It bears repeating that even if we assume the remedy of dissolving the permanent injunction subject to a final judgment is available on the basis of the trial judge's mental infirmity, **the Bisnos have made no showing to reasonably suggest that such infirmity infected the issuance of the permanent injunction in their case.** (App., *infra* 28a, bold emphasis added.)

Accordingly, the Court of Appeal affirmed the Motion Judge's decision. (App., *infra* 28a.)

D. Petition for Rehearing to Court of Appeal

The Bisnos timely filed a petition for rehearing and request to augment the record before the Court of Appeal. In the petition for rehearing, the Bisnos pointed out that neither party in this case had ever understood the return of the interlocutory appeal to the trial court to be a final judgment. (App.Pet.Reh. at pp. 1, 3-5, 6-7.) In support of this contention, Bisnos asked the Court of Appeal to grant a request to augment the record with Judge Nelson's minute

order entered June 30, 2004 after grant of the permanent injunction and notice of the interlocutory appeal was filed. (App.Pet.Reh. at pp. 1-2.) That order stayed trial of the cross-complaint until the results of the pending appeal returned to the trial court. (App.Pet.Reh. at p. 4.)

The Bisnos argued that the existence of this minute order and the lack of any entry of final judgment in the case formed the reasonable basis of the Bisnos filing a statement of disqualification against Ju lge Nelson under the judicial disqualification statute prior to entry of such final judgment. (App.Pet.Reh. at pp. 6-9.) The Bisnos requested rehearing on the ground that the Court of Appeal's assumption that there was a final judgment would constitute an injustice as the opinion significantly relied on this erroneous factual assumption. (App.Pet.Reh. at pp. 6-9.)

Additionally, the petition for rehearing specifically pointed out that the standard articulated by the Court of Appeal for a litigant to obtain a right of discovery of when a judge's mental infirmity first appeared was an impossible barrier that denied them due process of law as well. (App.Pet.Reh. at pp. 9-12.) The Bisnos contended that requiring a litigant to make a showing that a judge's mental infirmity tainted a prior decision so as to be granted the right of discovery to seek evidence to establish that the mental infirmity tainted the prior decision was a Catch -22 impossibility. (App.Pet.Reh. at pp. 2, 9-12.)

On March 2, 2007, the Court of Appeal denied both the petition for rehearing and the motion to augment the record with the minute order of Judge Nelson staying the remainder of the case until after prosecution of the interlocutory appeal.

E. California Supreme Court Proceedings

The Bisnos timely filed a petition for review with the California Supreme Court. Additionally, the Bisnos filed a request that the California Supreme Court de-publish the Court of Appeal opinion. On May 16, 2007, the California Supreme Court denied both the petition for review and request to de-publish leaving the Court of Appeal decision as the decision of the highest court of the State of California. (App., *infra* 34a.)

F. Stay of the Remittitur

The Bisnos timely filed with the Court of Appeal a motion to stay the remittitur. On May 25, 2007, the Court of Appeal granted the motion to stay the remittitur until August 6, 2007 and ruled that if a petition for certiorari was filed with the United States Supreme Court by that day, the issuance of the remittitur would be stayed until this Court disposes of the case. (App., *infra* 35a-36a.)

REASONS FOR GRANTING THE PETITION

The decision below offers an appropriate record and opportunity for the Court to clarify minimal constitutional due process that is owed to civil litigants regarding the mental competency of a judicial officer. The decision below currently stands as published precedent authorizing states to maintain judicial systems that fail to remedy fundamental unfairness and only this Court's action can point states in a more balanced direction.

The issue is of fundamental national importance to the integrity and credibility of our judicial system. Litigants whose cases are decided by mentally incompetent judges have not received justice, but rather are inflicted with judicial decisions that could have just as easily been made by the toss

of a dart, roll of a die, or the barbaric chance of a pistol duel. Constitutional due process ought at a minimum assure the integrity of our judicial system by promptly correcting even the appearance that decisions made by a diseased mind have been left standing. This Court is empowered to suggest the proper incentives and mechanisms to encourage early retirement and medical care for affected judicial officers, enable prompt removal of mentally incapacitated judges to avoid further disruption of the legal system, and correct the fundamental injustice of decisions initially made by a diseased mind. Allowing potentially mentally impaired judges' decisions to stand when no significant reliance or shift in positions of the parties has occurred, as this case demonstrates, is not in the national interest of maintaining the integrity and credibility of the judicial system.

There is some general evidence that dementia is a rising serious problem among members of the judiciary. The impact of Alzheimer's disease and related dementia is not easily quantified for those sitting on the bench, however, it is reasonable to assume that the impact on the judiciary at least will track the projections that dementia is rising dramatically in the general population.[5] A body of scientific literature reports that rising cases of obesity, which are linked to the plaque that deposits on brain structures impeding thought processes and memory may substantially increase the early onset of Alzheimer's disease and other dementia.[6] As a

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[5] *See, e.g.*, Alzheimer's Ass'n., *Alzheimer's Disease Facts and Figures* (2007), available at http://www.alz.org/national/documents/Report_2007FactsAndFigures.pdf .

[6] See, e.g., Thomas Jefferson Univ. Hospital, *Scientists Discover Mechanism Tying Obesity to Alzheimer's Disease* (Dec. 30, 2005), available at http://www.sciencedaily.com/releases/2005/12/051230084818.htm.

profession notoriously more sedentary than that of the general population, the judiciary may be especially at risk for an increasing incidence of dementia as a result of rising obesity.[7]

Irrespective of the basis for the increased incidence of dementia in the American population, the decision below represents an unfortunate national trend that statistics suggest will grow worse and guidance from this Court is now needed.

There has been and remains a great taboo in the judiciary against dealing with or acknowledging the existence of dementia and seeking solutions to avoid negative impacts on the justice system and the lives of litigants.[8] This Court may be the only institution that can authoritatively speak to the nation on such a sensitive subject, break down the judicial taboos of discussing it, and give it the urgency it deserves. The Geriatric Education Center of Michigan (GECM) has noted that one of the greatest barriers to diagnosis of dementia-related disease is the patient's own denial of a problem until the disease has reached a level of significant impairment.[9] In educational materials prepared with federal

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[7] JoAnn E. Manson, et al., *The Escalating Pandemics of Obesity and Sedentary Lifestyles*, Arch Intern Med. 2004, 164:249-258 (2004), available at http://archinte.ama-assn.org/cgi/content/abstract/164/3/249.

[8] Judge Kozinski in his concurring opinion in *United States v. State of Washington*, 98 F.3d 1159, 1166 noted that "[w]e have come a long way from the day when discussion of a judge's mental state was considered a breach of decorum." He cited this Court's opinion in *Slayton v. Smith*, 404 U.S. 53, 54, 92 S.Ct. 174, 174, 30 L. Ed.2d 209 (1971) in which this Court chastised the court of appeals for mentioning 'so delicate a subject' as a judge's mental condition in a published decision.

[9] Geriatric Education Center of Michigan, *Dementia in Primary Care Training Materials* (Rev. 02-28-07), available at http://www.dementiacoalition.org/professionals/pdfs/dementia_in_primary_care.pdf at page 2. See also, *United States v. State of Washington*, 98

grant funds from the Bureau of Health Professions of the Health Resources and Services Administration, GECM reported that patient and family denial of dementia inflicts harm on the patient (judicial officer) by delaying early drug intervention which might slow disease progression and the situation "can go on for months and years, as the problem only continues to worsen."[10] Ignoring the problem or fearing to confront it, as the California appellate courts have done in this case, misses an opportunity to clarify the constitutional parameters and offer solutions that are also in the good health interest of mentally impaired judicial officers to get early treatment. Judicial officers who have given tremendous public service deserve prompt life-extending treatment for dementia and the current legal framework reinforces deadly silence.

The record below demonstrates a California Superior Court Judge appears to have been impaired for about 1 ½ years before he had to be forced from the bench by the institution of formal proceedings by the California Commission on Judicial Performance. During that period, he decided countless motions, petitions, and presided over at least one non-jury trial – the trial result contested in this case. There was evidence that over 50 cases of the judge had to be reassigned and some decisions overturned. (R.T. at p. 11.)

This Court has never expressly held what most courts in the United States presume would be this Court's holding: that constitutional due process requires an impartial and mentally competent judicial officer. However, of even more national urgency is the need for guidance regarding the limits

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F.3d 1159, 1166 (9th Cir. 1996)(citing a New York Times article that reports people with Alzheimer's disease have a strong tendency to deny their condition).

[10] *Ibid.* at p. 6.

of this right that is presumed by most courts of this nation to exist. These limits might be identified by the following questions:

- Can an aggrieved litigant seeking to establish when a judge's alleged mental disability commenced obtain any discovery from the judge's medical provider?

- To avoid intrusion into the privacy of the judge's family life, can the court itself be required, as part of the due process right, to disclose to a litigant the name of the judge's medical provider and insurer so that discovery can proceed without upsetting the jurist's family and in the furtherance of the court's duty to do justice?

- Should the mere commencement of proceedings to remove a judge from the bench on the ground of mental incapacity sufficiently establish an orderly right to obtain medical records to identify what cases and decisions may or may not have been affected by the onset of degenerative brain disease?

- Should any right to discovery be limited to cases where the mental infirmity manifests itself prior to entry of a final judgment?

- Are there any circumstances after final judgment where the interests in finality and the end of litigation cut off the right to discover possible mental impairment that may have tainted a decision or judgment?

- Although this case does not involve a federal judge, has Congress, by establishing judicial councils and not providing a statutory right to challenge directly a

federal judge on the ground of mental incapacity struck the proper balance between Article III independence while assuring the federal judiciary's mental competence? Since state judges do not have Article III independence, does due process require mental competence for them and allow greater flexibility for the states to allow direct disqualification on mental capacity grounds?

Only this Court can bring some clarity to the due process implications of this societal trend that is statistically destined to have a growing impact on the judicial system of this nation.

I. The Decision Below Reflects Widespread Confusion And A Judicial Taboo Regarding How To Balance A Litigant's Due Process Right To A Mentally Competent Judicial Officer With Considerations Of Privacy Of The Officer And His Or Her Family

A. Fundamental Due Process Requires A Judicial Officer Who Is Impartial And Mentally Competent

The due process clause of the Fourteenth Amendment requires a "fair trial in a fair tribunal." *Witkin v. Larkin*, 421 U.S. 35, 46 (1975). It is well-established by this Court that litigants are entitled to have factual determinations made by persons who are mentally competent. Almost a century ago, in *Jordan v. Commonwealth of Massachusetts*, 225 U.S. 167, 176 (1912), this Court set the minimum standard in a case that questioned the competency of a juror: "Due process implies a tribunal both impartial and mentally competent to afford a hearing."

California Supreme Court and Court of Appeal rulings on this fundamental principle of federal due process are, of course, in accord. *See, People v. Millwee*, 18 Cal. 4th 96, 144 (1998); *Alta Church v. Capital Freight Lines*, 141 Cal.App.2d 246, 248 (1956). In *Alta Church*, the California Court of Appeal was certain that the right to a mentally competent juror was as fundamental as the right to an unbiased juror:

> "Although we have been referred to no cases in this state directly in point, surely there can be no question but that the right to a trial before mentally competent jurors is as fundamental as the right to trial before unbiased and unprejudiced jurors which our courts have held to be an 'inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution.'" *Id.* at p. 248 *citing People v. Galloway*, 202 Cal. 81, 92 (1927).

This Court has robust case law in the area of due process requirements for an impartial judicial officer free of bias or special interest in the outcome of a case. See, e.g., *Tumey v. Ohio*, 273 U.S. 510, 522 (1927)(due process violated when judge will earn revenue for village if defendant convicted); *In re Murchison*, 349 U.S. 133, 136 (1955)(no judge can try his own case or any case in which he has an interest in the outcome); *Ward v. Village of Monroeville*, 409 U.S. 57, 61 (1972)(due process violated if a judge would be tempted to not hold the balance nice, clear and true). Much of the Court's case law in this area aspires to draw the line heavily in favor of preserving the public's confidence that the judicial system strives to the utmost to operate fairly.

Consistent with this Court's *Jordan* case, the Bisnos contend that constitutional principles that argue for a due

process right to a mentally competent juror are indistinguishable from a due process right to a mentally competent judicial officer, especially one sitting as the trier of fact in a non-jury trial. Surely, to preserve the public's confidence in the justice systems of the states, mentally incapacitated judicial officers should be promptly removed and tainted decisions reconsidered to assure the guidance of *Jordan* that minimum due process requires a tribunal that is impartial and mentally competent.

B. This Court's Opinion In *Slayton v. Smith* May Dissuade Lower Courts From Protecting The Right To A Mentally Competent Judicial Officer

Smith v. Cox, 435 F. 2d 453 (4th Cir. 1970) is the only federal court of appeals case ever to squarely consider the Fourteenth Amendment Due Process Clause as requiring a judicial officer mentally competent to carry out his duties; however, this Court, in sub nom. *Slayton v. Smith*, 404 U.S. 53 (1971) vacated the Fourth Circuit Court of Appeals' judgment and remanded for the District Court to dismiss the petition for habeas corpus on the ground of failure to exhaust state remedies. *Id.* at 54.

In *Smith v. Cox*, the Fourth Circuit discussed at length that it had no doubt that due process guarantees a mentally competent judicial officer. *Smith, supra*, 435 F. 2d at 459-460. The court also observed that mental incompetence was at least as serious a defect as prejudice or interest on the part of a judge, both of which have already been held constitutionally impermissible. *Id.* at 460. Upon a showing of mental incompetence, the Fourth Circuit opined that a criminal sentence would have to be vacated and re-sentencing conducted by a new judicial officer who was mentally competent. *Id.*

On review, this Court vacated the Fourth Circuit judgment with direction to the District Court to dismiss the petition. *Slayton, supra,* 404 U.S. at 54. In its *per curiam* decision, this Court chastised the Fourth Circuit court for discussing in a published decision any implication of the merits of "so delicate a subject" as a judge's alleged senility. *Id.* Thus, *Smith v. Cox,* the Fourth Circuit decision that expressed such confidence of a constitutional right to a mentally competent judge, is of little precedential value and this Court's vacation of the judgment may have unintentionally reinforced the sense that dementia on the bench is not to be publicly discussed and addressed in an open and frank way that medical professionals now counsel.

C. A Decision From This Court Articulating The Minimum Due Process Parameters Concerning A Right To A Mentally Competent Judicial Officer Could Allow State Flexibility And Experimentation In Methods To Protect The Due Process Right

As the opinion below illustrates, state trial and appellate courts can be impatient and dismissive of reasonable prophylactic measures that might more appropriately balance constitutional interests in a fair tribunal with concerns about a public judicial employee's personal privacy or social taboos that inhibit frank discussions of Alzheimer's disease and dementia.

While constitutional due process represents the absolute minimum standard of judicial performance, states remain free to experiment and impose more strict requirements. The concept of allowing states freedom within constitutional limits is embedded in our nation's constitutional structure and law:

> "It is normally within the power of the State to regulate procedures under which its laws are carried out . . . and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental." *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 821 (1986)(*citing Patterson v. New York*, 432 U.S. 197, 201-202 (1977)).

And what could be more fundamental than a judicial officer, sitting as a trier of fact, who is competent of perceiving the evidence, and determining the facts?

II. The Decision Below Is Incorrect

A. The Court Below Erred In Concluding There Was A Final Judgment That Barred Application Of California's Judicial Disqualification Statute

The logic of the decision below substantially stands or falls on whether the order of Judge Nelson was a final judgment or merely an interlocutory judgment granting a permanent injunction. Relying on its conclusion that the first appeal was from a final judgment, the Court of Appeal held that *Urias v. Harris Farms, Inc.*, 234 Cal.App.3d 415 was distinguishable because in that case the summary judgment had not yet been reduced to final judgment. (App., *infra*, 4a.)

In the Court of Appeal's unpublished decision affirming Judge Nelson's order, the Court of Appeal specifically noted in its opinion that the appeal was authorized *solely* under California Code of Civil Procedure

section 904.1(a)(6), the statutory provision allowing interlocutory appeals of injunctions. (A.A. at p. 412.) Furthermore, at the time of the first appeal, the Court of Appeal characterized the Bisnos' appeal as interlocutory by failing to cite California Code of Civil Procedure section 904.1(a)(1), which authorizes appeals from final judgments. *Ibid.* Specifically, the Court of Appeal decision summarized the status of the appeal as follows:

> "On April 29, 2004, the court entered a permanent injunction requiring the Bisnos to move the sculpture to a spot not visible from the street, and to remove the gates. The Bisnos were further restrained from installing any gates or any item in their front motor court without ARC approval. **The Bisnos appeal from the judgment (order granting the permanent injunction). (Code Civ. Proc., § 904.1, subd. (a)(6).)**" (A.A. at p. 412, bold emphasis added.)

By citing only subdivision (a)(6) for interlocutory appeals of injunctions and not citing subdivision (a)(1) for final judgment appeals, the Court of Appeal's characterization was one of an interlocutory nature and not an appeal from a final judgment. This was also the understanding of the parties.

As set forth in the Statement of the Case, when the controversy over the mental capacity of Judge Nelson erupted and the Bisnos appealed a second time upon the denial of their Motion to Dissolve the Injunction on the ground of the incapacity of Judge Nelson, the Court of Appeal changed its characterization of the first appeal. The first indication that the Court of Appeal had changed its characterization occurred at oral argument on appeal, when for the first time, the court asked questions and asserted a claim that the permanent injunction was a final judgment. The Bisnos's counsel provided information why the first appeal was not

from a final judgment, but this was ignored in the written opinion.

In the opinion below, the Court of Appeal claimed the second appeal was an appeal of a "post-judgment" order. The differing characterization of the first appeal appears in the first sentence of the opinion below: "Defendants Jeanette and Robert Bisno (the Bisnos) appeal from an order denying their **postjudgment** motion to dissolve a permanent injunction." (App., *infra* 2a, bold emphasis added.) The footnote 1 after the first sentence continued this change in the Court of Appeal's characterization of the first appeal:

> "An order **after judgment** denying a motion to dissolve a permanent injunction is appealable under Code of Civil Procedure section 904.1, subdivision (a)(1) and (6). (See *Crespin v. Shewry* (2004) 125 Cal.App.4th 259, 264, fn.3 [22 Cal.Rptr.3d 696].)" (App., *infra* 29a, bold emphasis added.)

In their Petition for Rehearing, the Bisnos attempted to point out to the Court of Appeal that the characterization of the first appeal as a final judgment was inconsistent with a minute order issued by Judge Nelson on June 30, 2004 once the first interlocutory appeal went up to the Court of Appeal. Because none of the parties had addressed this newly raised final judgment issue, the minute order had not been included in the appellate record. For this reason, the Bisnos also moved the Court of Appeal to augment the record to include the June 30, 2004 minute order where Judge Nelson stayed the remainder of the case while on appeal. This minute order is entirely consistent with the Court of Appeal's characterization of the first appeal as interlocutory and is clearly demonstrated in the unpublished opinion for the first appeal. (A.A. at p. 412.)

The Court of Appeal did not seek to correct this plain error when the Petition for Rehearing specifically brought the error to the attention of the court. Instead, without comment, on March 2, 2007, the Court of Appeal issued its order denying the petition for rehearing and denying the motion to augment the record.

B. The Court Below Erred In Holding A Litigant Potentially Aggrieved By A Court Order Tainted By Judicial Officer Mental Incapacity Must Essentially Prove The Existence Of Such Taint Before Entitlement To A Right To Seek Discovery Of The Onset Of The Infirmity Of The Judicial Officer

In the opinion below, after holding that the statement of disqualification was filed after final judgment, the Court of Appeal entertained what kind of showing would be required if a litigant had a right to raise mental incapacity **after** a final judgment. (App., *infra* 27a-28a.) It was this portion of the opinion in which the Court of Appeal articulated its standard for a litigant to obtain a right to conduct discovery to establish whether mental incapacity in fact tainted a trial court's decisions. The Court of Appeal affirmed the trial court's refusal to allow discovery on the theory that "the Bisnos have made no showing to reasonably suggest that such an infirmity infected the issuance of the permanent injunction in their case." (App., *infra*, 28a.)

One is left to wonder precisely what evidence, reasonably available to a litigant, could ever meet the Court of Appeal's standard. The Court of Appeal determined that the Motion Judge properly took judicial notice that the public notification of the California Commission on Judicial Performance that stated it was commencing proceedings to remove Judge Nelson from the bench for degenerative brain

disease. Additionally, the Court of Appeal determined that the Motion Judge correctly took judicial notice of the fact the three statements of disqualification were filed in Department 46 cases and the fact that each of them alleged Judge Nelson was confused in the operation of his courtroom, and that one of them contained allegations of Judge Nelson's confusion dating back to the beginning of 2004. These statements were admitted for the purpose of establishing that these documents were filed for the purposes stated, but not for the truth of the factual allegations about mental incapacity contained in the notification and statements of disqualification.

Thus, the evidence properly before the trial court and the Court of Appeal was:

- That the Commission on Judicial Notice had commenced proceedings against Judge Nelson on the ground of permanent disability as a result of degenerative brain disease (Alzheimer's);

- That in two cases in Department 46 that statements of disqualification had been filed against Judge Nelson on the basis of Code of Civil Procedure section 170.1(a)(7) (that he was not able to perceive facts and conduct proceedings) on the ground of dementia or confusion;

- That Judge Nelson had agreed to his disqualification in at least one of those cases;

- That in the *Harris* case in Department 46 a statement of disqualification had been filed against Judge Nelson on the basis of Code of Civil Procedure section 170.1(a)(7) (that he was not able to perceive facts and conduct proceedings) on the ground of

confusion alleged to have been observed in the court in early 2004;

- That the Bisnos' case was tried in late spring 2004; and

- Alzheimer's disease is known to manifest itself slowly over months or years.

If traditional evidentiary rules apply, even without admission for the truth of the hearsay allegations of mental incapacity alleged in some of the documents, there was significant evidence showing Judge Nelson was likely to have been incapacitated at the time of trial. This conclusion is certainly also supported by the Judge's changing his mind twice about the injunction – odd shifts in judgment and decision-making being a classic symptom of Alzheimer's disease. Nonetheless, the Court of Appeal refused to acknowledge the significance of the evidence it considered properly admitted and instead affirmed the Motion Judge's denial of the opportunity to conduct any discovery.

Furthermore, the filing of a judicial disqualification may or may not justify the application of adversarial evidentiary rules as applied in this case. In order to assure justice is done and decisions that are the product of a diseased mind are struck from the judicial system to protect fundamental due process, it may be proper for a trial court to consider **all evidence** before it and simply give appropriate lesser weight to hearsay evidence in determining whether discovery should be allowed.

The error or purposeful reluctance of the Court of Appeal to allow this discovery illustrates the precise judicial taboo discussed *supra*. There is a tendency to circle the wagons to defend a colleague on the bench – it is human nature. For instance, despite the significant amount of evidence of mental

incapacity in this record at or near the time of their trial, the Court of Appeal in the decision below is almost accusatory of the Bisnos when it states:

> "Following issuance of the remittitur, the Bisnos **sought to avoid the permanent injunction** by filing a statement of disqualification against the trial judge . . . ." (App., *infra*, 3a, bold emphasis added).

The Bisnos's case was just one of 50 cases probably impacted by Judge Nelson remaining on the bench as long as he did, but the implication of this language in the Court of Appeal opinion almost implies the Bisnos were manufacturing the allegation of mental incapacity to "avoid" the injunction.

And, at the conclusion of the opinion, the Court of Appeal, selectively quoted Judge Kozinski of the Ninth Circuit Court of Appeals in *United States v. State of Washington,* 98 F.3d 1159, 1167 (9th Cir. 1996) to again disparage the Bisnos' effort to obtain definitive discovery of when Judge Nelson's infirmity commenced as "nothing more than an attempt 'to rummage through the health records of [a judge] who ruled against them . . . in the hope of coming up with a more compelling showing.'"

In fact, a thorough review of Judge Kozinski's concurring opinion demonstrates that he was criticizing the majority opinion in a federal case where there is no statutory right to challenge a judge's mental competence and the majority opinion had implied Federal Rule of Civil Procedure 60(b)(6) could be an avenue to challenge a judgment years after its entry. Kozinski criticized the majority opinion as an:

> "open invitation to parties to rummage through the health records of judges **who**

> **ruled against them five, ten, even twenty years ago,** in hope of coming up with a more compelling showing – or a district judge more receptive to the idea of reopening past judgments." *United States v. State of Washington*, *supra*, 98 F.3d at 1167, bold emphasis added.

The Bisnos undertook the filing of a statement of disqualification prior to the entry of a final judgment and in no way was seeking to overturn some ancient court ruling as the Indian Tribes sought to do in *United States v. Washington*.

These accusatory statements by the Court of Appeal telegraph the undercurrent of hostility toward retrying this case, despite the likelihood it was tainted by debilitating brain illness. It may also reflect the continuing taboo in the judiciary to frankly and openly discuss senile dementia and its impacts on the judicial system. These factors may have played a role in the refusal of the Court of Appeal to thoroughly assess the due process implications and balance the privacy interests of Judge Nelson and his family. In denying an opportunity to seek more definitive evidence of when Judge Nelson became impaired, the Court of Appeal ran roughshod over the due process rights of the Bisnos.

III. The Decision Below Is Final For Purposes Of 28 U.S.C. § 1257(a).

The Bisnos have consistently understood that both of their appeals to the California Court of Appeals, one from the grant of the injunction against them and one from the denial of the dissolution of the injunction, to be interlocutory. At the time of the first appeal, there existed a minute order staying the remainder of the case and an appeal recognized by the Court of Appeal as having been prosecuted only under

California Code of Civil Procedure section 904.1(a)(6)(interlocutory appeal of injunctions). When the remittitur returned, it was entirely appropriate for all parties to believe that further action was required to end the stay of the action, resolve remaining issues like attorneys' fees, and enter a final judgment. This understanding of the law is consistent with *Crespin v. Shewry*, the case cited by the Court of Appeal in support of the proposition that a permanent injunction after a final judgment is always appealable. The court in that case also emphasized that a permanent injunction "is in essence of an executory or continuing nature" and "always subject, upon proper showing, to modification or dissolution" and as such did not determine "all issues, or end the litigation as to any party." *Crespin v. Shewry*, 125 Cal.App.4th 259, 269 (2004).

On the basis of this understanding of the law of injunction, the Bisnos reasonably thought that the return of the remittitur after the first appeal reinvested the trial court with jurisdiction at the end of an interlocutory appeal. It was at this point that Bisnos filed the statement of disqualification after having just learned of the administrative leave of Judge Nelson and concluding their own investigation that showed evidence of mental impairment in other cases prior in time to their own bench trial.

Such an interlocutory set of appeals might argue for a lack of finality within the meaning of 28 U.S.C. § 1257(a), however, the facts of this case auger for a conclusion that this case is final within the meaning of this Court's jurisdictional statute.

There can be little doubt that contrary to the understanding of the Bisnos and their counsel of the interlocutory nature of the appeals regarding the injunction, both the California Court of Appeal and its Supreme Court have spoken in the opinion below claiming that the first

appeal was not an interlocutory appeal, but rather an appeal of a "final judgment." Thus, the State of California, through its appellate courts, claim finality and have made decisions contrary to the interests of the Bisnos based upon those conclusions of finality. The record here firmly commits the State of California to undertake no further review of these decisions without this Court's intervention.

As this Court observed in *Department of Banking v. Pink*, 317 U.S. 264, 286:

> "the test is not whether under local rules of practice the judgment is denominated final * * * but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court."

There is no question that the Court of Appeal and Supreme Court of California opinions meet this test of finality for the purposes of this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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COURT OF APPEAL OF CALIFORNIA,
SECOND APPELLATE DISTRICT,
DIVISION FOUR

NORTH BEVERLY PARK HOMEOWNERS ASSOCIATION,
Plaintiff and Respondent,

v.

JEANNETTE A. BISNO et al.,
Defendants and Appellants.

February 13, 2007, Filed

COUNSEL: Burke, Williams & Sorensen, James B. Hicks; Mintz & Werner and Marshall G. Mintz for Defendants and Appellants.

Wolf, Rifkin, Shapiro & Schulman, Marc E. Rohatiner and Denise M. Parga for Plaintiff and Respondent.

JUDGES: Willhite, Acting P. J., with Manella and Suzukawa, JJ., concurring.

OPINION BY: Willhite

OPINION

WILLHITE, Acting P. J.—

INTRODUCTION

Defendants Jeannette and Robert Bisno (the Bisnos) appeal from an order denying their postjudgment motion to dissolve a permanent injunction.[1] This appeal is their second in a lawsuit brought against them by plaintiff North Beverly Park Homeowners Association (the Association).

Beginning in 1999, the Bisnos planned to build a home in North Beverly Park, a luxury community in Beverly Hills. The Association's architectural review committee disapproved certain aspects of the Bisnos' plans, including the design of their front gates, and a particular sculpture they intended to place in their motor court. In June 2002, the Association sued the Bisnos for breach of covenants, nuisance, and trespass. As here relevant, the Association sought an injunction preventing the Bisnos from installing the front gates and sculpture. The trial judge initially granted a preliminary injunction prohibiting installation of the sculpture and gates. Ten months later, on the Bisnos' motion, the court dissolved the injunction. The Bisnos then installed the sculpture and gates.

From March 8 through March 26, 2004, the trial judge held a nonjury trial on the Association's complaint. On April 29, 2004, the judge entered a permanent injunction requiring the Bisnos to move the sculpture to a spot not visible from the street, and to remove the gates. The injunction further restrained the Bisnos from installing any gates or items in their front motor court without permission from the architectural review committee.

The Bisnos appealed. In an unpublished opinion, we affirmed the judgment.[2] The Bisnos' petition for review

to the California Supreme Court was denied, and the remittitur issued on October 13, 2005.

Following issuance of the remittitur, the Bisnos sought to avoid the permanent injunction by filing a statement of disqualification against the trial judge under Code of Civil Procedure section 170.1, subdivision (a)(7), on the ground that he suffered an impairment of memory preventing him from recalling the trial testimony.[3] The Bisnos also filed a motion to dissolve the permanent injunction under Civil Code section 3424, alleging that the judge's impairment required dissolving the injunction in the interests of justice. In support of this motion, the Bisnos attempted to use, inter alia, the trial judge's failure to respond to their statement of disqualification as evidence that the trial judge consented to disqualification, requiring that their allegations be deemed true.

The matter was assigned to a different judge, whom we shall refer to, for clarity, as the motion judge. The motion judge denied the motion to dissolve the permanent injunction.

The Bisnos now appeal from the order denying their motion. In response to their various contentions, we hold that the statutory procedure for disqualification of judges for cause (§ 170.3) does not apply to final judgments. Therefore, the trial judge's failure to answer or strike the Bisnos' statement of disqualification, which was filed and served after final judgment, does not constitute consent to retroactive disqualification, and does not require that the allegations of the statement of disqualification be deemed true. Further, we find the primary decision on

which the Bisnos rely, *Urias v. Harris Farms, Inc.* (1991) 234 Cal. App. 3d 415 [285 Cal. Rptr. 659] (*Urias*), to be distinguishable (it involved a judgment not yet final), and conclude that its reasoning does not apply to require application of the statutory disqualification procedure to final judgments. Finally, we conclude that even if the analysis of *Urias* were to apply here, the Bisnos' statement of disqualification failed to allege sufficient facts to compel the trial judge's disqualification.

Concerning the Bisnos' motion to dissolve the permanent injunction, we assume (without deciding) that a judge's disability may be a basis in equity under Civil Code section 3424 to dissolve a permanent injunction that is the subject of a final judgment. Nonetheless, we conclude that the Bisnos failed to meet their burden of proof, and that the motion judge did not abuse his discretion in refusing to dissolve the injunction and in denying the Bisnos' request for discovery of the trial judge's mental condition. Therefore, we affirm the judgment.

DISCUSSION

I. *The Statement of Disqualification*

The remittitur in the prior appeal issued on October 13, 2005. Approximately six weeks later, on November 30, 2005, the Bisnos filed in the trial court a verified "Statement of Disqualification." The document identified the trial judge by name, as well as his department number, and stated: "Trial Date: March 8, 2004." However, nowhere did it clearly state that it was seeking the trial judge's retroactive disqualification.

Nor did it state that it was seeking to have the final judgment vacated.

In the body of the document, the Bisnos' attorney purported to "object to the hearing of the above matter by the [named trial judge], on the grounds that the judge is disqualified from hearing and determining this matter" under section 170.1. The stated ground was that the judge "is unable to properly perceive the evidence or is unable to properly conduct the proceeding because of a permanent or temporary physical impairment in that [he] is suffering from an impairment of memory which prevents him from recalling the testimony adduced at trial." Although the statement did not identify the particular statutory ground for disqualification, it is apparent that it referred to section 170.1, subdivision (a)(7), which provides that a judge is disqualified if "[b]y reason of permanent or temporary physical impairment, the judge is unable to properly perceive the evidence or is unable to properly conduct the proceeding."

In support of this ground, the Bisnos' attorney alleged the following supporting facts: "In instances subsequent to the trial of this action, [the judge] has exhibited to other lawyers a lack of memory and concentration while he was on the bench. I now believe that [he] was suffering from such lack of memory and concentration while acting as the trier of fact in this case and his physical impairments, while existing at the time of trial, became more manifest subsequent to the trial. I am informed and believe that [the trial judge's] impairments reached the point where he was put on administrative leave by the Superior Court. I first became concerned about [the trial judge's] physical

impairments on or about October 17, 2005 through a conversation with another lawyer who knew that I had a case before [the judge] and himself had information about [the judge] having been placed on administrative leave and the reasons therefore. I subsequently followed up and confirmed that information with another lawyer known to me who also had a case before [the judge] and who informed me of his personal observations of [the judge's] physical impairments which manifested themselves in a lack of memory and concentration while on the bench."

The Bisnos personally served the statement of disqualification on the trial judge at his residence on December 6, 2005. The judge was then on leave from the court, apparently based on his medical condition, and never responded to the statement of disqualification.

Relying on *Urias, supra*, 234 Cal. App. 3d 415, and section 170.3, subdivision (c)(4), the Bisnos argue that the trial judge's failure to respond constituted a consent to disqualification, and that the statement of disqualification must be deemed true. Therefore, according to the Bisnos, the judge was disqualified based on his impairment of memory during the trial. As a result, the judgment must be vacated and the permanent injunction dissolved.

California law holds that rulings by a judge later found to be disqualified are either "void" or "voidable"—the precise label depending on which line of authority the particular court decides to follow. (See *Christie v. City of El Centro* (2006) 135 Cal.App.4th 767, 776, 779–780 [37 Cal. Rptr. 3d 718], & cases cited therein [noting

conflict, and concluding that the decision in *Giometti v. Etienne* (1934) 219 Cal. 687, 688–689 [28 P.2d 913] compels lower courts to find rulings by disqualified judge void rather than voidable]; cf. 2 Witkin, Cal. Procedure (4th ed. 1996) Courts, §§ 91–95, pp. 127–135 [advocating view that because court has subject matter jurisdiction, disqualified judge's rulings are voidable rather than void].) The distinction is important when dealing with a final judgment, because "a party seeking to set aside a voidable judgment or order must act to set aside the order or judgment before the matter becomes final" (*Christie, supra*, 135 Cal.App.4th at p. 780), whereas describing the judgment as void—meaning the court lacks subject matter jurisdiction—suggests that the judgment is subject "to *collateral attack* at any time," a result Witkin accurately describes as "highly undesirable" (2 Witkin, *supra*, § 93, p. 131). Whether a judgment rendered by a disqualified judge is considered void or voidable, the issue of disqualification must be raised at the earliest reasonable opportunity after the party becomes aware of the disqualifying facts. (*Urias, supra*, 234 Cal. App. 3d at p. 425.)

Of course, the instant case involves a final judgment. Trial was held (with no mention of the judge's purported incapacity), and judgment was entered by the trial court. On the Bisnos' appeal, we affirmed. The Bisnos' petition for review to the California Supreme Court was denied, and the remittitur issued. Thus, the judgment of the trial court is final for all purposes. (See 9 Witkin, *supra*, Appeal, § 728, pp. 758–759; *id.*, § 731, pp. 761–762; *id.*, § 733, pp. 762–763.)

Without discussion, the Bisnos simply assume that the statutory procedure for disqualification of judges for cause set forth in section 170.3 applies to final judgments, and that judges must respond accordingly to statements of disqualification filed after final judgment or risk automatic disqualification and the vacating of their judgment. However, no California decision has involved an attempt to use the statutory disqualification procedure to vacate a final judgment on the ground of the trial judge's disqualification. Some decisions involve an attack on a nonfinal judgment by a separate action in equity; others, a direct attack on such a judgment by a motion to vacate the judgment, or a statement of disqualification under the statutory disqualification scheme. But none of these decisions approves use of the statutory procedure to retroactively disqualify the trial judge so as to attack a final judgment.[4] Indeed, the language of the current disqualification statutes makes clear that the procedural scheme is directed at pending proceedings.

Section 170.3, subdivision (a)(1), provides in relevant part that "[i]f a judge determines himself or herself to be disqualified, the judge shall notify the presiding judge ... and shall not further participate *in the proceeding* [with exceptions not here relevant], unless his or her disqualification is waived by the parties as provided in [section 170.3,] subdivision (b)." (§ 170.3, subd. (a)(1), italics added.) The word "proceeding" is defined as "the action, case, cause, motion, or special proceeding *to be tried or heard by the judge*." (§ 170.5, subd. (f), italics added.) Thus, section 170.3, subdivision (a)(1), contemplates a judge disqualifying himself or herself from pending proceedings—those *to be* tried or

heard—not from proceedings in which a final judgment has been entered.

Under the statutory scheme, a party files a statement of disqualification when "a judge who should disqualify himself or herself refuses or fails to do so." (§ 170.3, subd. (c)(1).) Further, the party's statement of disqualification "object[s] to the hearing or trial *before the judge*," not to the hearing or trial *previously* before the judge, in which the judgment is now final. (§ 170.3, subd. (c)(1), italics added.)

The disqualification statutes expressly cover the situation in which the "grounds for disqualification are first learned of or arise after the judge has made one or more rulings in a proceeding, *but before the judge has completed judicial action in a proceeding*." (§ 170.3, subd. (b)(4), italics added.) In that situation, the judge "shall, unless the disqualification be waived, disqualify himself or herself, but in the absence of good cause the rulings he or she has made up to that time shall not be set aside by the judge who replaces the disqualified judge." (§ 170.3, subd. (b)(4).) The scheme also has a procedure when "a statement of disqualification is filed after a trial or hearing has commenced by the start of voir dire, by the swearing of the first witness or by the submission of a motion for decision." (§ 170.4, subd. (c)(1).) Under this procedure, "the judge whose impartiality has been questioned may order the trial or hearing to continue, notwithstanding the filing of the statement of disqualification[,] ... and if it is determined [by another judge] that the judge is disqualified, all orders and rulings of the judge found to be disqualified made after the filing of the statement shall be vacated." (§ 170.4, subd. (c)(1).) The statutory scheme thus has

procedures applicable before judicial action is completed and when a statement of disqualification is filed midtrial or midhearing. However, it does not have a procedure applicable when the issue of disqualification is first raised after final judgment—a clear indication that the Legislature never contemplated applying the statutory disqualification procedure in such a circumstance.

It is in the context of the statutory procedure as a whole that the judge's duty to answer or strike a statement of disqualification must be understood. (See *Glassman v. McNab* (2003) 112 Cal.App.4th 1593, 1600 [6 Cal. Rptr. 3d 293] [statute must be construed in the context of the statutory scheme, with an eye to harmonizing the various parts].) The judge's option to answer (or to formally consent to disqualification) is contained in section 170.3, subdivision (c)(3). That subdivision provides that "[w]ithin 10 days after the filing or service [of the statement of disqualification], whichever is later, the judge may file a consent to disqualification ... or the judge may file a written verified answer admitting or denying any or all of the allegations contained in the party's statement and setting forth any additional facts material or relevant to the question of disqualification." The option to strike the statement of disqualification arises under section 170.4, subdivision (b), which provides that the judge "may order [the statement] stricken" if it is untimely or fails to disclose grounds for disqualification.

The automatic disqualification provision of section 170.3, subdivision (c)(4), on which the Bisnos rely, provides that "[a] judge who fails to file a consent or answer within the time allowed *shall be deemed to have*

consented to his or her disqualification ... ." (Italics added.) Further, as the Bisnos note, it is generally stated that if the judge fails to answer or strike a statement of disqualification, the facts alleged in the statement must be deemed to be true. (See *Urias, supra*, 234 Cal. App. 3d at p. 424.)

But automatic disqualification under section 170.3, subdivision (c)(4), and the related rule that facts alleged in the statement of disqualification are deemed true if the judge does not respond, do not exist outside the statutory procedure as a whole. The statutory procedure clearly contemplates the judge responding to statements of disqualification filed in pending proceedings, not those filed after final judgment. Thus, to apply the automatic disqualification provision to disqualify a judge for failing to respond to a disqualification statement filed after final judgment would be to apply the provision beyond its intended use.

By its terms, therefore, the procedural scheme of the disqualification statutes does not apply to statements of disqualification filed after final judgment. Hence, the trial judge's failure to answer or strike the Bisnos' statement of disqualification cannot be deemed consent to disqualification under section 170.3, subdivision (c)(4), and cannot require that the allegations in the statement be deemed true.

The Bisnos' reliance on *Urias, supra*, 234 Cal. App. 3d 415, is misplaced. There, the trial judge granted the defendant's motion for summary judgment, and entered judgment for the defendant. The plaintiff then filed a series of statements of disqualification requesting that

the judge be disqualified, and that his ruling on summary judgment be voided. The stated ground was that the judge was disqualified under section 170.1, subdivision (a)(2), because the judge's former law firm had represented the defendant in prior litigation for the past 10 years. (234 Cal.App.3d at p. 419.) The trial judge did not respond to any of the requests for disqualification, nor did he strike them. (*Ibid.*) The issue of disqualification was assigned to a different judge, who ruled under section 170.3, subdivision (c)(4), that the challenged judge had consented to disqualification by failing to respond.

The Court of Appeal affirmed the challenged judge's disqualification. First, the court held that by failing to respond to the statement of disqualification, the judge consented to disqualification under section 170.3, subdivision (c)(4), for "failing to respond to an allegedly untimely and legally insufficient statement of disqualification." (*Urias, supra*, 234 Cal.App.3d at p. 420, italics omitted.) Next, the court considered whether the summary judgment had to be reversed in light of the judge's subsequent disqualification. (*Id.* at p. 422.) The court noted that "the disqualification statutes do not prescribe a remedy for this situation where the judge is found to be disqualified after judgment is entered, and the only ruling in issue is a summary judgment which disposed of all the issues in the case." (*Id.* at p. 423.) Nonetheless, the court referred to earlier decisions under former disqualification statutes permitting the vacating of a judgment on the basis that the judge who rendered it was later found to be disqualified. (*Ibid.*) Among other decisions, the court referred to *Cadenasso v. Bank of Italy, supra*, 214 Cal. at page 569, and observed that

the court in *Cadenasso* stated that a challenge to " 'the trial judge by reason of his interest in the subject matter of the suit may be made at any time before the judgment becomes final' but expressed no opinion on whether an action to vacate the judgment would lie after the judgment became final." (*Urias, supra,* 234 Cal. App. 3d at p. 423.) Agreeing with authorities suggesting that rulings by a disqualified judge are voidable rather than void, the court reasoned: "A party who seeks to declare a judgment void on the ground the judge was disqualified must allege and prove facts which clearly show that such disqualification existed. [Citation.] [¶] Under those authorities, the grant of summary judgment in this case is voidable if [plaintiff] 'properly raised' the disqualification issue and alleged facts which show the judge was disqualified to hear the case." (*Id.* at p. 424.)

Because the judge had consented to disqualification, the court deemed the facts alleged in the statement of disqualification to be true. (*Urias, supra,* 234 Cal.App.3d at p. 424.) The court determined that the statement was filed at the " 'earliest practicable opportunity' " after the plaintiff discovered the disqualifying facts (*id.* at p. 425), and also found that the statement alleged adequate facts to disqualify the judge, namely, that within the last two years the defendant was a client of the judge's former law firm and partner. (*Id.* at p. 426.) The court concluded: "Accordingly, plaintiff raised the issue of the judge's disqualification in a timely manner after the judge had completed judicial action in the proceeding and before the judgment was final. Further, his uncontradicted allegation established disqualification under section 170.1, subdivision (a)(2). Because the summary

judgment was rendered by a disqualified judge, the judgment was voidable upon plaintiff's objection." (*Id.* at p. 426.)

On its face, the decision in *Urias* is distinguishable. There, the court agreed with the line of authority declaring judgments rendered by disqualified judges voidable rather than void. Thus, the court found the statements of disqualification timely because they were filed "after the judge had completed judicial action in the proceeding *and before the judgment was final.*" (*Urias, supra*, 234 Cal. App. 3d at p. 426, italics added.) Of course, here the Bisnos' statement of disqualification was filed after a final judgment on appeal. Thus, under the literal holding of *Urias*, the Bisnos' statement of disqualification was not timely.

Further, *Urias*'s interpretation of the statutory procedure cannot be extended to require that we deem the trial judge to have consented to disqualification by the Bisnos, or that we deem the allegations of the Bisnos' statement of disqualification to be true. The court in *Urias* conceded that the statutory disqualification scheme does "not prescribe a remedy for this situation where the judge is found to be disqualified after judgment is entered." (*Urias, supra*, 234 Cal.App.3d at p. 423.) Nonetheless, the court applied what is, in essence, the remedy provided by section 170.3, subdivision (c)(4): The court concluded that by failing to answer the statement of disqualification or strike it, the judge consented to disqualification, and also concluded that the facts alleged in the statement of disqualification must be deemed true. (234 Cal.App.3d at pp. 422, 424.)

We have no occasion on the facts here to disagree with the specific holding in *Urias* that section 170.3, subdivision (c)(4), applies to statements of disqualification filed in proceedings in which a judgment has been entered, but is not yet final. We caution only that the reasoning of *Urias* does not govern statements of disqualification filed after *final* judgment. As we have explained, the statutory disqualification procedure does not apply to statements of disqualification filed after final judgment. Thus, regardless of the analysis used in *Urias*, section 170.3, subdivision (c)(4), cannot be used to retroactively disqualify a nonresponding trial judge after final judgment; nor in those circumstances can it be used to deem the allegations of the disqualification statement true and require the vacating of the judgment.

Finally, even if we were to conclude that the statutory disqualification scheme applies to final judgments, and that we must assume the truth of the Bisnos' statement of disqualification, we would nonetheless hold that the trial judge was not disqualified. As stated in *Urias*, the party seeking to have a judgment declared void on the ground that the judge was disqualified must produce facts "which clearly show that such disqualification existed." (*Urias, supra*, 234 Cal. App. 3d at p. 424.) In *Urias*, the allegations in the statement of disqualification, which were assumed to be true, stated sufficient facts to meet the prior representation ground of disqualification under section 170.1, subdivision (a)(2). Here, by contrast, the Bisnos' statement of disqualification failed to allege facts clearly showing that the trial judge was disqualified for incapacity under section 170.1, subdivision (a)(7).

In the statement of disqualification, the Bisnos' attorney purported to "object to the hearing of the above matter by the [named trial judge], on the grounds that the judge is disqualified from hearing and determining this matter" under section 170.1. The stated ground for disqualification was that the judge "*is* unable to properly perceive the evidence or *is* unable to properly conduct the proceeding because of a permanent or temporary physical impairment in that [he] *is* suffering from an impairment of memory which prevents him from recalling the testimony adduced at trial." (Italics added.) This assertion relates to the judge's *current* ability to perceive evidence and to conduct proceedings. Of course, such an assertion is irrelevant to the judge's condition during the trial more than 19 months earlier. It certainly does not "clearly show" (*Urias, supra*, 234 Cal. App. 3d at p. 424) that the ground for disqualification existed during the trial. Indeed, nowhere does the statement of disqualification mention that the Bisnos were seeking to retroactively disqualify the trial judge, vacate the judgment, and dissolve the permanent injunction.

Further, the only facts alleged in support of disqualification related to instances of incapacity *after* the trial. The Bisnos' attorney declared: "In instances *subsequent to the trial of this action*, [the judge] has exhibited to other lawyers a lack of memory and concentration while he was on the bench. I now believe that [he] was suffering from such lack of memory and concentration while acting as the trier of fact in this case and his physical impairments, while existing at the time of trial, became more manifest subsequent to the trial. I am informed and believe that [the trial judge's] impairments reached the point where he was put on

administrative leave by the Superior Court. I first became concerned about [the trial judge's] physical impairments on or about October 17, 2005 through a conversation with another lawyer who knew that I had a case before [the judge] and himself had information about [the judge] having been placed on administrative leave and the reasons therefore. I subsequently followed up and confirmed that information with another lawyer known to me who also had a case before [the judge] and who informed me of his personal observations of [the judge's] physical impairments which manifested themselves in a lack of memory and concentration while on the bench."

Pointedly lacking from this recitation are any facts even remotely demonstrating the judge's purported incapacity during the Bisnos' trial. Not a single instance of erratic conduct or material loss of memory at trial suggesting incapacity is mentioned. That counsel, in retrospect, now believed that the judge was incapacitated adds nothing to the calculus. Hence, even if assumed to be true, the statement of disqualification fails to meet the Bisnos' burden of clearly proving that the trial judge was disqualified under section 170.1, subdivision (a)(7) during the trial.

II. *The Motion to Dissolve the Permanent Injunction*

Besides filing and serving a statement of disqualification, the Bisnos separately moved to dissolve the permanent injunction under Civil Code section 3424. That section provides, in relevant part: "Upon notice and motion, the court may modify or dissolve a final injunction upon a showing ... that the ends of justice would be served by the modification or

dissolution of the injunction." (Civ. Code, § 3424, subd. (a).) The Bisnos argued that "the ends of justice" required dissolution of the injunction because it was issued by a judge suffering from a disabling infirmity that prevented him from recalling the testimony at trial.

In substance, the Bisnos' motion is the equivalent of an equitable attack on a final judgment, seeking to vacate it based on retroactive disqualification of the judge for mental incapacity. A definitive ruling on whether a final judgment can be vacated on such a ground should await decision in a case where an otherwise adequate factual basis is provided, and the issue is adequately briefed. This is not such a case.

We shall assume (without deciding) that a motion to dissolve a permanent injunction subject to a final judgment may be made on the ground that the judge who issued it was disqualified for mental incapacity. As we have noted, the party seeking to have a judgment declared void on the ground that the judge was disqualified must produce facts "which clearly show that such disqualification existed." (*Urias, supra*, 234 Cal.App.3d at p. 424.) Because such a motion lies in equity, the ruling denying the motion is reviewed for abuse of discretion. (*Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 771 [110 Cal. Rptr. 2d 861].) "Under that standard, we resolve all evidentiary conflicts in favor of the judgment and determine whether the court's decision ' "falls within the permissible range of options set by the legal criteria." ' [Citations.]" (*Ibid.*)

On December 8, 2005, the Bisnos filed their motion to dissolve the permanent injunction. They later

supplemented the motion on December 20, 2005. The basis of the motion was the Bisnos' contention that the trial judge was suffering from mental infirmities at the time of the trial that prevented him from recalling the testimony adduced at trial.

In support of the motion, the Bisnos' attorney filed a declaration in which he stated that he first became aware of the trial judge's mental infirmities on October 17, 2005, when informed by another attorney. In his supplemental showing, counsel declared that he learned that the Commission on Judicial Performance had commenced proceedings against the trial judge, seeking his removal on the ground that he suffered from degenerative brain disease that prevented him from performing his duties.

The motion judge found no competent evidence that the trial judge was incompetent during the trial, and denied the motion to dissolve the injunction. We find no abuse of discretion in that ruling. We discuss each category of evidence produced by the Bisnos in turn.

A. *The Trial Transcript*

The Bisnos presented 59 excerpts from the reporter's transcript of the 2004 bench trial. Through hindsight, the Bisnos' attorney contended that the excerpts showed the judge's disqualifying lapses of memory.

We have independently examined the excerpts in the context of the record as a whole.[5] Most are too trivial to mention in any detail. They depict such minor incidents as the judge once saying that he forgot the question asked by counsel, the judge asking for clarification of

exhibit numbers,[6] the judge asking for clarification of whether an objection had just been made and the judge saying "pardon" in response to statements of counsel. Only three excerpts depict the judge expressing a lack of recollection concerning portions of the evidence: he did not remember a stipulation relating to the last page of exhibit No. 611; he did not remember testimony elicited "last week" concerning Robert Bisno's dispute with a member of the Association's architectural review committee, Brian Adler; and he did not recall the Bisnos' neighbor, Mike Medavoy, testifying that he liked the sculpture that the Association sought to have the Bisnos remove.

Such minor lapses certainly do not suggest that the judge suffered from a debilitating lack of memory sufficient to disqualify him from the proceeding. Indeed, at the hearing on the motion to dissolve the permanent injunction, the Bisnos' attorney conceded that during the trial nothing in the judge's conduct led him to believe the judge was disabled. Moreover, in opposition to the Bisnos' motion, the Association produced voluminous excerpts demonstrating instances of the trial judge's command of the proceedings and the evidence. There is simply nothing in the record of the trial that reasonably tends to show that the judge was suffering from a disqualifying mental disability.

B. *Disqualification Motions in Other Cases*

The Bisnos requested that the motion judge take judicial notice of motions to disqualify the trial judge from pending proceedings in three other cases. In the first (*Morgan v. California Federal Bank* (Super. Ct. L.A. County, No. BC308284)), a statement of

disqualification was filed on April 20, 2005. The attorney for the moving party declared that the judge exhibited confused and unfocused behavior during proceedings occurring on April 11 through 13, 2005. In the second case (*Hunter v. State Farm Fire & Casualty* (Super. Ct. L.A. County, No. BC262742)), a motion to disqualify the judge was filed on April 25, 2005. The attorney for the moving party declared that in proceedings occurring on April 11, 20, and 21, 2005, the judge was confused and unaware of activities in the courtroom. On May 13, 2005, the judge consented to disqualification in that case, and the case was transferred to another judge.

In the third case (*Harris v. Investor's Business Daily, Inc.* (Super Ct. L.A. County, No. BC269313)), the statement of disqualification was filed on December 16, 2005. The attorney for the moving party declared that he first became suspicious of the trial judge's mental impairment in early 2004, but did not have sufficient evidence to move for disqualification until December 15, 2005.

The motion judge took judicial notice of the declarations filed in these three cases, but not of the truth of their hearsay contents. The ruling was correct. The hearsay rule applies to statements contained in judicially noticed documents, and precludes consideration of those statements for their truth unless an independent hearsay exception exists. (See 1 Witkin, Cal. Evidence (4th ed. 2000) Judicial Notice, § 25, p. 119.) There is a hearsay exception for the use of declarations in motion practice, but that exception applies to declarations filed in support of motions in the present action, not those filed in other actions. Section

2009 provides that "[a]n affidavit may be used ... upon a motion." Under section 2015.5, declarations under penalty of perjury may be used in lieu of affidavits. (§ 2015.5.) Thus, under section 2009, affidavits and declarations may be used in support of a motion, even though they are hearsay. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2006) ¶ 9:46, p. 9(I)-24.) However, the "motion" referred to in section 2009 is a motion filed in the case at hand—section 1004 provides that "motions must be made in the court in which the action is pending." Thus, the limited hearsay exception of section 2009 for affidavits and declarations in support of a motion applies to motions filed in the present case, not those filed in support of motions in unrelated cases.

Nonetheless, even if the declarations are considered for their truth, they do not reasonably tend to prove that the judge was incapacitated during the Bisnos' 2004 trial. One of the declarations involved allegations of the judge's confused and unfocused behavior during proceedings on April 11 through 13, 2005. Another involved allegations of similar conduct occurring on April 11, 20, and 21, 2005. In the latter case, the judge consented to disqualification on May 13, 2005, and the case was transferred to another judge. Of course, the Bisnos' case was tried, and the permanent injunction issued, *more than one year before* these alleged incidents (trial Mar. 8–Mar. 26, 2004; permanent injunction issued Apr. 29, 2004). Thus, without more, these two declarations are irrelevant to prove that the judge was disqualified during the Bisnos' proceedings.

In the third declaration, the attorney seeking the judge's disqualification declared that he first became

suspicious of the trial judge's mental impairment in early 2004, but did not have sufficient evidence to move for disqualification until December 15, 2005. This attorney's mere suspicion of the judge's mental impairment in early 2004, without real evidence until December 2005, does not reasonably tend to show that the judge was incapacitated when he issued the permanent injunction in the Bisnos' case, especially when considered in light of the lengthy trial record, which discloses no evidence of disqualifying impairment, and gave no participating attorney any concern over the trial judge's physical or mental state.

C. *Notice of Proceedings by Commission on Judicial Performance*

Finally, the Bisnos' attorney requested that the trial court take judicial notice of the notice of formal proceedings instituted by the Commission on Judicial Performance on or about December 7, 2005.[7] The notice alleged that the judge suffered from a disability (degenerative brain disease) that seriously interfered with his judicial performance and was likely to become permanent.

The trial court correctly took judicial notice of the institution of proceedings, but not of the truth of the allegations in the notice. (See *Columbia Casualty Co. v. Northwestern Nat. Ins. Co.* (1991) 231 Cal. App. 3d 457, 473 [282 Cal. Rptr. 389].) Although the allegations of the notice clearly cannot be considered for their truth, they would add nothing to the Bisnos' showing, even if considered true. The notice was not filed until more than 19 months after the permanent injunction was issued on April 29, 2004, and it fails to specify exactly

when the alleged medical condition reached the point where it purportedly interfered with the judge's performance.

D. *Conclusion*

Thus, assuming (without deciding) that a permanent injunction subject to a final judgment may be dissolved on the ground that the judge who issued it was disqualified for mental incapacity, the Bisnos failed to meet their burden of clearly proving that the disqualifying condition existed. (*Urias, supra*, 234 Cal. App. 3d at p. 424.) Therefore, the motion judge did not abuse his discretion in denying the motion.

In this regard, we find the instant case analogous to *U.S. v. State of Wash.* (9th Cir. 1996) 98 F.3d 1159. There, in 1979 the district court judge issued a ruling holding that the plaintiffs, certain Indian tribes, had no fishing rights under a treaty. (*Id.* at p. 1162.) Before issuing his ruling, the judge had had surgery for an aortic aneurysm, and informed all counsel that because of his health, he had requested that the Chief Judge remove him from the case. The tribes, however, asked that the judge decide the case. The Chief Judge granted their request, and the district judge then ruled. The Ninth Circuit affirmed the judge's ruling, and the United States Supreme Court denied certiorari. (*Ibid.*)

However, in June 1992, a Seattle newspaper reported that when he ruled in 1979, the judge was suffering from Alzheimer's disease. The article noted that the judge's death certificate listed Alzheimer's, which set in during 1978, as a secondary cause of death. The article quoted the judge's son as stating that the judge was

articulate until February 1978, when he went into a decline that ended with his death in 1984. The judge's son also stated that he believed the judge was competent when he ruled in 1979. (*U.S. v. State of Wash., supra*, 98 F.3d at p. 1162.)

In November 1993, the Indian tribes filed a motion in the district court under Federal Rules of Civil Procedure, rule 60(b)(6) (28 U.S.C.), to obtain relief from the 1979 judgment. Rule 60(b)(6), permits relief from a final judgment "upon such terms as are just" and for "any ... reason justifying relief from the operation of the judgment." The tribes later argued that the motion was for the limited purpose of obtaining discovery concerning the trial judge's mental health at the time he made his 1979 ruling. (*U.S. v. State of Wash., supra*, 98 F.3d at p. 1162.) The district court denied relief, and a divided panel of the Ninth Circuit affirmed.

The Ninth Circuit majority noted that Federal Rules of Civil Procedure, rule 60(b)(6), provided an equitable remedy to prevent manifest injustice under extraordinary circumstances. The majority held that the trial judge's possible mental incompetence did not constitute extraordinary circumstances justifying the vacating of the judgment. The majority reasoned: "The Three Tribes argue that [rule] 60(b)(6) relief should be granted and discovery allowed because of the possibility that they were denied a competent fact-finder when their treaty status was decided by [the trial judge]. This is not one of those rare cases where 'extraordinary circumstances' warrant vacating an 'erroneous judgment.' The Three Tribes offer only [the trial judge's] death certificate and the Seattle Post-Intelligencer Article to support their contention that

[the judge] may have suffered some mental impairment in 1979. The death certificate states that [the judge] was diagnosed with Alzheimer's sometime in 1978. In the newspaper article [the judge's] son says that his father was a changed man after his 1978 surgery, but that he was mentally competent when he decided the tribes' treaty status. The correspondence from [the judge] shows that the judge knew his surgery had physically weakened him and that he also knew of his obligation to decide the tribes' treaty status. When he felt unable to fulfill his commitment to decide the tribes' status 'within the next several months,' he asked [the Chief Judge] to remove him from the case. The tribes responded by requesting that [the judge] rule on their status before stepping down. [The Chief Judge] allowed their motion and [the judge] ruled. We should not reopen a judgment under these circumstances. Moreover, this court, as well as a magistrate judge, closely examined the case and reached the same conclusion as [the trial judge]. A decision on the issue of whether Rule 60(b)(6) gives the district court the power to correct a manifest injustice arising from a judge's disability should await the extraordinary circumstances in which it might be presented. The district court did not abuse its discretion in denying the Three Tribes' motion to reopen the judgment and allow discovery." (*U.S. v. State of Wash., supra*, 98 F.3d at pp. 1163–1164.)

Similarly, in the instant case, the Bisnos have produced weak evidence, at best, that the trial judge was disabled during their trial. Indeed, the trial record itself discloses no evidence reasonably supporting the Bisnos' claim. Like the majority of the Ninth Circuit in *U.S. v. State of Wash.* interpreting Federal Rules of Civil

Procedure, rule 60(b)(6), we need not decide whether a permanent injunction subject to a final judgment may be vacated under Civil Code section 3424 on the grounds of the judge's mental incapacity. That determination must await a case with a compelling factual record, and focused briefing by the parties. Here, assuming the remedy sought by the Bisnos was available, the motion judge did not abuse his discretion in refusing to dissolve the permanent injunction on the ground of the trial judge's alleged inability to recall the evidence at trial.

III. *The Request for Discovery*

In conjunction with the motion to dissolve the permanent injunction, the Bisnos requested to take discovery. In particular, the Bisnos' attorney wished to depose the trial judge's wife to learn her observations of the trial judge's mental state and to determine the identity of the judge's treating physicians. He also wished to obtain the judge's mental health records. The motion judge denied the requested discovery.

In contending that the motion judge erred, the Bisnos rely on the concurring opinion of Judge Kozinski in *U.S. v. State of Wash.*, *supra*, 98 F.3d at page 1166 (*United States*). Judge Kozinski concurred in the judgment of the majority, but on the ground that Federal Rules of Civil Procedure, rule 60(b)(6), provides no authority to vacate past judgments because of the judge's disability. Nonetheless, he stated his view that "*were* mental disability a proper basis for setting aside the judgment, plaintiffs would have made a sufficient showing" to obtain discovery "from the judge's doctors to confirm or refute speculation about the judge's competence." (98

F.3d at p. 1166 (conc. opn. of Kozinski, J.), original italics.) Judge Kozinski lamented, however, that the majority's ruling left "an open invitation to parties to rummage through the health records of judges who ruled against them five, ten, even twenty years ago, in the hope of coming up with a more compelling showing." (Id. at p. 1167.)

In the instant case, we find no reasonable basis to permit the Bisnos to depose the trial judge's wife, or to obtain his medical records. It bears repeating that even if we assume the remedy of dissolving the permanent injunction subject to a final judgment is available on the basis of the trial judge's mental infirmity, the Bisnos have made no showing to reasonably suggest that such an infirmity infected the issuance of the permanent injunction in their case. Absent such a showing, the Bisnos' request for discovery is nothing more than an attempt "to rummage through the health records of [a judge] who ruled against them ... in the hope of coming up with a more compelling showing." (*United States, supra*, 98 F.3d at p. 1167 (conc. opn. of Kozinski, J.).) We find no abuse of discretion in the motion judge's denial of discovery. (Cf. *United States, supra*, 98 F.3d at p. 1164.)

DISPOSITION

The order denying the motion to dissolve the permanent injunction is affirmed. The Association shall recover its costs on appeal.

Manella, J., and Suzukawa, J., concurred.

Footnotes below

1An order after judgment denying a motion to dissolve a permanent injunction is appealable under Code of Civil Procedure section 904.1, subdivision (a)(1) and (6). (See *Crespin v. Shewry* (2004) 125 Cal.App.4th 259, 264, fn. 3 [22 Cal. Rptr. 3d 696].)

2*North Beverly Park Homeowners Assn. v. Bisno* (June 21, 2005, B175173) [nonpub. opn.].

3All undesignated section references are to the Code of Civil Procedure.

4In *Cadenasso v. Bank of Italy* (1932) 214 Cal. 562 [6 P.2d 944], the California Supreme Court entertained a separate action in equity to set aside a nonfinal judgment based on the trial judge's conflict of interest (stock ownership in the bank which had prevailed as plaintiff in the earlier case). The court expressly declined to express an opinion on whether the action could have been brought had the judgment been final. (*Id.* at p. 569.) Relying on its earlier decision in *Lindsay-Strathmore I. Dist. v. Superior Ct.* (1920) 182 Cal. 315, 332 [187 P. 1056], the court held only that "the plain inference from [*Lindsay-Strathmore*] is that objection to ... the trial judge by reason of his interest in the subject matter of the suit may be made at any time before the judgment becomes final." (*Cadenasso, supra*, 214 Cal. at p. 569.) Other California decisions have similarly considered attempts to disqualify the trial judge and vacate nonfinal judgments. (See *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 637–638, 656–659 [49 Cal. Rptr. 2d 620] [separate action, filed while underlying judgment was on appeal, to vacate the judgment on the ground that the judge was disqualified for bias; action dismissed under Code

Civ. Proc., § 425.16 as SLAPP (strategic lawsuit against public participation) suit]; *Urias, supra*, 234 Cal.App.3d at pp. 419–426 [statement of disqualification under § 170.1, filed after entry of summary judgment, seeking to vacate judgment based on judge's prior representation of defendant; disqualification of judge, and vacating of judgment, affirmed]; *Valvo v. University of Southern California* (1977) 67 Cal.App.3d 887, 890 [136 Cal. Rptr. 865] [motion to vacate judgment during pendency of appeal on the ground the trial judge had financial interest in case and was biased; denial affirmed in the absence of facts showing the judge was disqualified]; *Tatum v. Southern Pacific Co.* (1967) 250 Cal.App.2d 40, 40–43 [58 Cal. Rptr. 238] [motion to vacate judgment after trial judge disclosed stock ownership in defendant railroad; disqualification of judge, and vacating of judgment, affirmed]; *Muller v. Muller* (1965) 235 Cal.App.2d 341, 342–346 [45 Cal. Rptr. 182] [motion to vacate default judgment on the ground the judge previously represented an unrelated party in prior litigation involving parties to the present suit; denial of motion affirmed for, inter alia, failure to establish the disqualification and failure to raise the issue at earliest practicable opportunity]; *Wickoff v. James* (1958) 159 Cal.App.2d 664, 670–671 [324 P.2d 661] [motion to vacate judgment of nonsuit on the ground the trial judge was disqualified for having once served as attorney for defendants; denial of motion to vacate affirmed for failure to allege and prove facts which clearly show such disqualification existed]; cf. *Christie v. City of El Centro, supra*, 135 Cal.App.4th at pp. 776–780 [after grant of nonsuit, but before judgment, motion for new trial and § 170.1 challenge filed based on trial judge having discussed case with another judge who had been disqualified by a § 170.6

challenge; grant of new trial affirmed]. See also Cal. Forms of Pleading and Practice (Matthew Bender 2006) § 317.35[2], p. 317-45 [noting uncertainty as to whether California law permits vacating final judgment on the ground of the judge's disqualification].)

5We have granted the Association's motion requesting that we take judicial notice of the reporter's transcript of the trial.

6Our review of the trial record shows that scores of exhibits were introduced into evidence: exhibit Nos. 4, 10–12, 14–16, 22–23, 30–32, 35–36, 46, 50, 56, 60 68–69, 70–71, 79–82, 86, 95, 99, 102, 104, 110, 113, 119, 121–123, 125–126, 135–137, 146, 151, 167, 169, 170, 172–175, 183, 185, 194, 197, 200–201, 207, 220, 221–222, 228, 244, 259, 269, 288, 323, 325, 328–329, 331–332, 334, 337–339, 345, 349, 355–360, 361–377, 379, 381–382, 500, 502–505, 506, 508, 510–511, 514–522, 525–527, 533, 536–539, 540–544, 546, 548–551, 557, 559, 562–565, 567, 572–575, 577–578, 584–585, 588–589, 590, 595–597, 601, 603, 606, 611, 613–615, 619–621, 624, 627, 633–634, 639–642, 643, 649, 651–655, 657–658, 660–712, 714, 715–716, 718, 721–729, 739, 740, 752, 765, 784–785, 787, 797, 799–804, 806–815, 817–818, 819–826, and 871. Thus, it is hardly surprising that the judge would occasionally seek assistance in clarifying which exhibits were being used at any particular time.

7The Bisnos also requested that the court take judicial notice of a news article from the Los Angeles Times, and a press release from the Commission on Judicial Performance. The trial court declined to do so, and the Bisnos wisely do not challenge that ruling on appeal.

Filed: 2/1/06
SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

NORTH BEVERLY PARK HOMEOWNERS ASSOCIATION, INC., a California non-profit corporation,
Plaintiff,

vs.

JEANNETTE A. BISNO, an individual; and DOES 1 through 25, Inclusive,
Defendants.

Case No.: BC 275041 (Consolidated with Case No. BC 288585)

[Assigned to the Michael Stern, - Dept. 62]

Complaint Filed: June 5, 2002

ORDER DENYING MOTION TO DISSOLVE PERMANENT INJUNCTION

Date: January 25, 2006

Time: 8:30 a. m.
Dept.: 62

The motion to dissolve permanent injunction of defendants ROBERT H. BISNO and JEANNETTE A. BISNO came on for hearing on January 25, 2006, in Department 62 of the above-entitled court, the

Honorable Michael Stern presiding. Denise M. Parga, Esq. and Marc E. Rohatiner, Esq. appeared on behalf of plaintiff North Beverly Park Homeowners Association, Inc. Marshall G. Mintz, Esq. and James Hicks, Esq. appeared on behalf of defendants Robert H. Bisno and Jeannene A. Bisno.

After consideration of the moving, opposing and reply papers and oral argument of counsel, the Court denied the motion.

GOOD CAUSE APPEARING THEREFOR,

IT IS THEREFORE ORDERED that the motion to dissolve the permanent injunction is denied.

Dated: February 1, 2006

Hon. Michael Stern
Judge of the Superior Court

S151324

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

NORTH BEVERLY PARK HOMEOWNERS ASSOCIATION,
Plaintiff and Respondent,

v.

JEANNETTE A. BISNO et al.,
Defendants and Appellants.

May 16, 2007, Filed

OPINION

The petition for review is denied.

The request for an order directing depublication of the opinion is denied.

Ronald George
Chief Justice

Filed: 3/25/2007

IN THE COURT OF APPEAL OF CALIFORNIA,
SECOND APPELLATE DISTRICT,
DIVISION FOUR

NORTH BEVERLY PARK HOMEOWNERS ASSOCIATION,
Plaintiff and Respondent,

v.

JEANNETTE A. BISNO et al.,
Defendants and Appellants.

THE COURT:*

The court has read and considered the motion by appellants Jeanette and Robert Bisno to stay issuance of the remittitur to permit them to petition the United States Supreme Court for writ of certiorari. The court has also read and considered respondent North Beverly Park Homeowners Association's opposition. The remittitur is currently scheduled to issue on June 4, 2007. The court grants the motion to stay issuance of the reittitur for a period of 60 days, to and including August 6, 2007. Should no petition for certiorari be filed by that date, the remittitur shall immediately issue on August 7, 2007. Should a petition be filed by August 6, 2007, this stay shall remain in effect until the United States Supreme Court finally disposes of the petition. Respondent's request that appellants be required to post a bond is denied.

*WILLHITE, Acting P.J.

No. 07-144

SEP 6 - 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

JEANNETTE A. BISNO and
ROBERT H. BISNO INDIVIDUALLY; and
DOES 1 THROUGH 25, INCLUSIVE,

Petitioners,

v.

NORTH BEVERLY PARK HOMEOWNERS
ASSOCIATION, INC., A CALIFORNIA
NON-PROFIT CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Second Appellate District

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARC E. ROHATINER
DENISE M. PARGA
Counsel of Record

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Attorneys for Respondent

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

After all appeals have been exhausted and a judgment is final, can a litigant seek discovery of the trial judge's mental capacity where there is no evidence in the record that the trial judge was incompetent?

CORPORATE DISCLOSURE

North Beverly Park Homeowners Association, Inc. is a California non-profit mutual benefit corporation. It does not have a parent corporation.

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JURISDICTION

In this instance, Petitioners contend that the state court's denial, after final judgment, of their request to conduct discovery of the trial judge's mental competency at the time of trial presents an important question of federal law. In *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1953), decided under Supreme Court Rule 10's predecessor, Rule 19, the U.S. Supreme Court set forth the following standard:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. [citations omitted] "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decisions of constitutional issues unless avoidance becomes evasion.

Id. at 74.

In this case, following Petitioners' unsuccessful appeal of a three-week bench trial and after all appeals had been exhausted and the remittitur issued, Petitioners sought to either dissolve the judgment for permanent injunction or, in the alternative, depose the trial judge's wife and medical practitioners on the ground that the judge may have been mentally incompetent at the trial. Petitioners never complained or raised any concerns about Judge Nelson's competency (a) during any of the numerous law and

motion matters that preceded trial; (b) during the three-week trial; (c) during any of the post-trial motions; (d) during the initial appeal which resulted in a complete affirmance of Judge Nelson's decision; or (e) during their unsuccessful petition to the California Supreme Court to review the first decision of the California Court of Appeal.

The state trial and appellate court reviewed the trial transcript and found no evidence that the trial judge had been mentally incompetent or mentally impaired in any way and, accordingly, did not vacate the judgment or permit depositions of the judge's wife and medical practitioners. The granting of a writ is not warranted merely to review the evidence or inferences that can be drawn from the evidence. *General Talking Pictures Corp. v. Western Electrical Co.*, 304 U.S. 175, 178 (1937).

In short, this case presents a factually unique situation that is essentially of importance only to Petitioners and presents no real federal question. Since review on a writ of certiorari is not a matter of right but of discretion. *(Hammerstein v. Superior Court*, 341 U.S. 491, 492 (1951)), the petition should be denied.

STATEMENT OF THE CASE

A. The filing of the complaint

On June 5, 2002, Respondent initiated this action to enjoin J. Bisno (who at the time was the sole owner of Lot 66) from installing gates at her property without approval of the ARC. [I Appellants' Appendix ("A.A.") 1-163.] Respondent subsequently named R. Bisno as a Doe Defendant.

B. Trial

A bench trial commenced on Respondent's complaint and supplemental complaint on March 8, 2004 and concluded on March 30, 2004. Appellants' cross-complaint in the action and complaint in Case No. BC 288585 was severed prior to trial. Judge Nelson issued a Statement of Intended Decision on April 2, 2004. [III A.A. 394-97.]

C. Petitioners dismiss their cross-complaint

On April 5, 2004, Petitioners filed their dismissal of the cross-complaint in the action. [App., *infra*, 1a.][1]

D. Judgment for Permanent Injunction is entered

On April 29, 2004, Judge Nelson entered Judgment for Permanent Injunction. [III A.A. 398-408. App., *infra*, 6a.] *There was no cross-complaint pending at the time the Judgment was entered.* Thereafter, Judge Nelson, in response to Respondent's motion for attorneys' fees and Petitioners' motion to tax costs, awarded Respondent $275,000 in attorneys' fees and costs.

E. Notice of Appeal

On May 3, 2004, Petitioners filed a Notice of Appeal of the Statement of Intended Decision. On July 6, 2004, Petitioners filed a Notice of Appeal of the Judgment for Permanent Injunction. The Appeal sought reversal of the Judgment on the grounds that Judge Nelson misapplied

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[1] The Appendix to this Petition will be cited hereinafter as "(App., *infra*, ___ a)."

the law and made findings of fact that were not supported by substantial evidence. [III A.A. 409-38.] Although Petitioners obviously raised every argument they could think of, *the one argument they failed to make was that Judge Nelson was incompetent.*

F. First Appellate Decision

On June 21, 2005, the Court of Appeal, Second Appellate District, Division Four, affirmed the trial court's Judgment in its entirety. [III A.A. 409-38. App., *infra*, 14a.] The Court noted that Petitioners were appealing from the judgment for permanent injunction. The Court of Appeal rejected each of Petitioners' issues of error and affirmed the Judgment in all respects. On September 21, 2005, the California Supreme Court denied Petitioners' Petition for Review [III A.A. 439.] The remittitur issued on October 13, 2005. [III A.A. 440.] All appeals having been exhausted, the Judgment for Permanent Injunction was a final judgment.

G. Petitioners file the Statement of Disqualification and Motion to Dissolve the Permanent Injunction after the Remittitur is issued

On November 30, 2005, Petitioners filed a Statement of Disqualification (the "Statement"). [III A.A. 441-44.] Thereafter, on December 8, 2005, Petitioners filed its initial Motion to Dissolve the Injunction, which was subsequently amended [III A.A. 446-64, III A.A. 515-79.]

On January 25, 2006, the Honorable Michael L. Stern (the "trial judge"), after considering Petitioners' papers and Respondent's opposition [I R.A. 001-299; II R.A. 300-599 and III R.A. 600-96], denied the Motion to Dissolve the

Injunction, dissolved the stay of enforcement of judgment for permanent injunction and granted Respondent's Motion for Attorneys' Fees on Appeal. [R.T. 1-23.] The Orders Denying the Motion to Dissolve Perm. nent Injunction and Dissolving Stay were entered on February 1, 2006. [III R.A.750-58 and 734-41.] Judgment for Appellate fees and costs was similarly entered on February 1, 2006. [III R.A.742-49.]

H. The Second Appeal

Thereafter, Petitioners filed another Notice of Appeal of the order after judgment denying Petitioners' request to dissolve the judgment for permanent injunction. On February 13, 2007, the California Court of Appeal denied Petitioners' appeal.

REASONS FOR DENYING THE PETITION

Petitioners sought to void the judgment for permanent injunction on two bases:

1. Petitioners sought retroactive disqualification of the trial judge under California statutory law.

2. Petitioners sought to dissolve the judgment for injunction based on California Civil Code Section 3424(a), which vests the trial court with discretion to dissolve a final injunction where (1) there has been a material change in the facts upon which the injunction was granted; (2) the law upon which the injunction was granted has changed; or (3) the ends of justice would be served by the modification or dissolution of the injunction.

The California Court of Appeal, following California judicial precedent, concluded that the California statutory disqualification statutes do not provide for disqualification of a judge after a final judgment is rendered. The Court of Appeal correctly interpreted California law.[2] With respect to Petitioners' motion to dissolve the injunction under Section 3424(a), the Court of Appeal concluded that Petitioners failed to meet their burden of proof under Section 3424(a). The Court of Appeal reviewed the trial transcript and notably found that "not a single instance of erratic conduct or material loss at trial suggesting incapacity is mentioned." It concluded that the trial court did not abuse its discretion in finding that there was no competent evidence that the trial judge was incompetent during trial. The California Court of Appeal held: "there is nothing in the record of the trial that reasonably tends to show that the judge was suffering from a disqualifying mental disability." Finally, the California Court of Appeal affirmed the trial court's denial of request for discovery on the ground that Petitioners made no showing to reasonably suggest that a mental "infirmity infected the issuance of the permanent injunction."

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[2] Before the judgment was rendered, the cross-complaint was dismissed. The judgment was a final, appealable judgment. *See, e.g., Crocker-Anglo Nat'l Bank v. Kuchman*, 194 Cal. App. 2d 589 (1961) (appeal from nonsuit on complaint premature where cross-complaint is pending). In addition, the judgment became final for all purposes after the remittitur was issued.

A. Collateral Evidence Of Judge Nelson's Possible Impairment Standing Alone Is Insufficient As A Matter Of Law

The Court of Appeal found from the trial transcript that Judge Nelson was competent. Petitioners contend that self-serving statements from disgruntled attorneys from other proceedings claiming that Judge Nelson evidenced impairment in those cases, despite the evidence that Judge Nelson showed no impairment in this case, should warrant depositions of the judge's wife and doctors. The only legal authority that addresses this specific issue stands for the proposition that *the beginning point of the analysis must be the record from the challenged proceedings.* Absent evidence supporting a claim of impairment from that record, the trial court cannot allow discovery of the trial judge's mental condition.

In *United States of America v. State of Washington,* 98 F.3d 1159 (9th Cir. 1996), *cert. denied, Duwamish Indian Tribe v. United States*, 522 U.S. 806 (1997), a case remarkably similar to this case, the Ninth Circuit affirmed the district court's denial of a motion to vacate a 1979 judgment entered against various Indian tribes on the ground that the trial judge may have suffered from Alzheimer's disease in 1979. In 1992, eight years after the trial judge died, the Seattle Post-Intelligencer published an article which reported that the judge had suffered from Alzheimer's disease at the time of his 1979 judgment. Apparently, the judge's death certificate stated that the onset of Alzheimer's disease occurred in 1978, one year prior to the judgment under attack. The newspaper article quoted the judge's son, who stated that the judge went into a state of deterioration after February 1978 but that he believed that his father was mentally competent when he

rendered the 1979 decision at issue. In February 1978, the judge underwent surgery for an aortic aneurysm. By February 1979, he informed all counsel that in light of his physical health, he had requested that the Chief Judge remove him from the case. The Indian tribes, however, requested that the judge rule on their treaty.

The 1979 decision was affirmed by the Ninth Circuit which concluded that the judge had applied an incorrect legal test but that in applying the correct test, the evidence supported the judge's findings of fact. The Ninth Circuit affirmed the judgment because "'the district court correctly resolved this question despite its failure to apply the proper standard.'" *Id.* at 1162.

The Indian tribes later filed a motion for relief from the 1979 judgment pursuant to Federal Rule of Civil Procedure 60(b)(6), which permits a party to seek relief from a final judgment for any reason justifying relief from the operation of the judgment.

The Indian tribes wanted to conduct discovery into the state of the judge's mental health at the time he rendered his 1979 decision. The district court denied the motion on three grounds:

> First, courts should avoid disturbing the public interest in the finality of judgments. Second, a ruling for the Three Tribes would open the floodgates to future challenges to judgments on grounds of judicial incompetence. Third, the Three Tribes suffered no 'manifest injustice' because the magistrate judge and the Ninth Circuit reached the same conclusion as Judge Boldt.

Id. at 1162-63.

In affirming the trial court's denial of the Indian Tribes' Rule 60(b)(6) motion, the Ninth Circuit stated:

> The Three Tribes argue that 60(b)(6) relief should be granted and discovery allowed because of the *possibility* that they were denied a competent fact-finder when their treaty status was decided by Judge Boldt. This is not one of those rare cases where "extraordinary circumstances" warrant vacating an "erroneous judgment." The Three Tribes offer only Judge Boldt's death certificate and the Seattle Post-Intelligencer Article to support their contention that Judge Boldt *may* have suffered some mental impairment in 1997. The death certificate states that Judge Boldt was diagnosed with Alzheimer's sometime in 1978. In the newspaper article Judge Boldt's son says that his father was a changed man after his 1978 surgery, but that he was mentally competent when he decided the tribes' treaty status. The correspondence from Judge Boldt shows that the judge knew his surgery had physically weakened him and that he also knew of his obligation to decide the tribes' treaty status. When he felt unable to fulfill his commitment to decide the tribes' status "within the next several months," he asked [the Chief Judge] to remove him from the case. The tribes responded by requesting that Judge Boldt rule on their status before stepping down. . . . We should not reopen a judgment under these circumstances. *Moreover, this court, as well as a magistrate judge, closely examined the case and reached the same conclusion as Judge Boldt. . . . The district court did not abuse its discretion in denying the Three Tribes' motion to reopen the judgment and allow discovery.* (Emphasis added)

Id. at 1163-64.

Similarly, in *People v. Pratt*, 205 Cal. App. 2d 838 (1962), a party challenged a judgment claiming that the trial judge's blindness deprived that party of a fair trial. The California Court of Appeal made clear that even assuming a disability, the key issue is whether *on the basis of the record*, the party challenging the decision was able to demonstrate that the trial judge was unable to try the case. In rejecting the claim, the court of appeal stated:

> [T]here is nothing *in the record* before us which shows or give rise to a reasonable inference that the trial judge was "by reason of permanent or temporary physical impairment" including blindness "unable to properly perceive the evidence or properly conduct the proceedings" in the instant case.

Id. at 841.

The court of appeal concluded:

> The defendant had a full and fair trial and an opportunity with the assistance of counsel to prepare and present his defense. We therefore find nothing under these particular facts which denied him due process. Assuming the judge's impairment of vision, *we cannot conclude on this record that by reason thereof he was unable to properly perceive the evidence or properly conduct the proceedings*. (Emphasis added)

Id. at 845-46.

Once again, just like in *People v. Pratt,* the starting and ending point in the analysis is the trial court record. Unless the record reveals prejudice resulting from an alleged impairment, the judgment is upheld and no discovery of the judge's mental condition is permissible.

Under Petitioners' analysis, any judgment may be challenged after the fact regardless of the objective indicia of a judge's competence if the losing party learns facts regarding a judge's personal life that would cause him or her to argue, without any evidentiary foundation, that "perhaps" the judge was not perceiving the evidence because his mind was elsewhere. There are many situations, other than a permanent medical condition, that *might* impact a trial judge's ability to concentrate during trial. The trial judge could have recently lost a loved one or be in the middle of a divorce proceeding or suffering from some business reversal. All those situations could arguably distract a trial judge.

To the extent Petitioners' position were adopted, as noted in *United States of America v. State of Washington*, there would be floodgate of litigation. If all a litigant had to show in order to challenge a ruling was that at the time of the trial, there were external factors that might have impacted on the trial judge's ability to focus on the trial without having to cite examples of impairment from the trial transcript, no judgment would be secure.

In this instance, the California Court of Appeal reviewed the transcript of the trial and concluded that there was no evidence that Judge Nelson was impaired in his conduct of the trial.

Petitioners contend that the trial court erred in denying their request to conduct discovery regarding Judge Nelson's competence. In this case, discovery would be totally irrelevant. As indicated in *United States of America v. State of Washington*, there must be a threshold showing of impairment evident from the record. That is especially true when a judgment withstands a complete

review on appeal. Regardless of what the discovery revealed about Judge Nelson's mental condition at the time of trial, as a matter of law, unless Petitioners met the threshold showing (evidence of mental impairment from the trial transcript), there would be no basis for dissolving the injunction. Therefore, the trial court and the California Court of Appeal, having reviewed the trial transcript and having concluded that there was no evidence of mental impairment, did not deprive Petitioners of any due process rights in denying discovery.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

WOLF, RIFKIN, SHAPIRO & SCHULMAN, LLP
DENISE M. PARGA
MARC E. ROHATINER

Attorneys for Respondent, North Beverly Park Homeowners Association

ATTORNEY OR PARTY WITHOUT ATTORNEY (*Name and Address*):	TELEPHONE NO.:	*FOR COURT USE ONLY*
James B. Hicks (SBN 109117) Ervin, Cohen & Jessup LLP 9401 Wilshire Blvd., Ninth Floor Beverly Hills, CA 90212 ATTORNEY FOR (*Name*): Defendant and cross-complainants Robert Bisno and Jeannette Bisno	(310) 273-6333	
Insert name of court and name of Judicial district and branch court, if any: Los Angeles County Superior Court Central District		
PLAINTIFF/ PETITIONER: North Beverly Park Homeowners Association, Inc. **DEFENDANT/ RESPONDENT:** Jeanette Bisno et al.		
REQUEST FOR DISMISSAL ☐ **Personal Injury, Property Damage, or Wrongful Death** ☐ **Motor Vehicle** ☐ **Other** ☐ **Family Law** ☐ **Eminent Domain** ☒ **Other (*specify*):** Trespass, Breach, etc.		**CASE NUMBER:** BC 275 041 (Consolidated with case no. BC 288 585)

— A conformed copy will not be returned by the clerk unless a method of return is provided with this document. —

1. **TO THE CLERK:** Please dismiss this action as follows:

   a. (1) ☐ With prejudice (2) ☒ Without prejudice
   b. (1) ☐ Complaint (2) ☐ Petition
   (3) ☒ Cross-complaint filed by (*name*): Jeanette A. Bisno and Robert H. Bisno on (*date*): March 5, 2004
   (4) ☐ Cross-complaint filed by (*name*): on (*date*):
   (5) ☐ Entire action of all parties and all causes of action
   (6) ☒ Other (*specify*): Third amended and supplemental cross-complaint for damages, filed by Jeannette A. Bisno and Robert H. Bisno on March 5, 2004, as for all cross-defendants

Date: April 5, 2004

/s/ James B. Hicks
(TYPE OR PRINT NAME OF
☒ ATTORNEY
☐ PARTY WITHOUT ATTORNEY)

/s/ ▸ James B. Hicks
(SIGNATURE)
Attorney or party without attorney for:

* If dismissal requested is of specified parties only, of specified causes of action only, or of specified cross-complaints only, so state and identify the parties, causes of action, or cross-complaints to be dismissed.

☐ Plaintiff/ Petitioner ☐ Defendant/ Respondent
☒ Cross-complainant

2. **TO THE CLERK:** Consent to the above dismissal is hereby given.**

Date:

_____ ▶ _____

(SIGNATURE)

(TYPE OR PRINT NAME OF
☐ ATTORNEY
☐ PARTY WITHOUT ATTORNEY)

Attorney or party without attorney for:

** If a cross-complaint – or Response (Family Law) seeking affirmative relief – is on file, the attorney for cross-complainant (respondent) must sign this consent if required by Code of Civil Procedure section 581(i) or (j).

☐ Plaintiff/ Petitioner ☐ Defendant/ Respondent

☐ Cross-complainant

(*To be completed by clerk*)

3. ☒ Dismissal entered as requested on (*date*): Apr. 5, 2004
4. ☐ Dismissal entered on (*date*): as to only (*name*):
5. ☐ Dismissal not entered as requested for the following reasons (*specify*):
6. ☐ a. Attorney or party without attorney notified on (*date*):
   b. Attorney or party without attorney not notified Filing party failed to provide
      ☐ a copy to conform
      ☐ means to return conformed copy

JOHN A. CLARKE, CLERK

Date: Apr. 5, 2004 Clerk, by /s/ [Illegible] , Deputy

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)
)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 9401 Wilshire Boulevard, Ninth Floor, Beverly Hills, California 90212.

On April 5, 2004, I served the foregoing document on the interested parties in this action by placing [] the original [X] a true copy thereof enclosed in sealed envelope(s) addressed as follows:

Denise Parga, Esq. (courtesy copy by fax)
Wolf, Rifkin, Shapiro & Schulman, LLP
11400 West Olympic Blvd., 9th floor
Los Angeles, CA 90064-1557

[X] BY MAIL

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Beverly Hills, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[ ] BY FAX

I faxed such documents pursuant to Los Angeles County Rules of Court, Section 520(c)(4), to the fax number(s) listed on the attached service mailing list; and [ ] By placing true copies thereof enclosed in sealed envelope(s) addressed as stated on the attached service mailing list.

[ ] BY PERSONAL SERVICE

I caused **FIRST COURIER SERVICE** to personally deliver such envelope by hand to the offices and/or residence of the address(es) as indicated on the attached list.

Executed on April 5, 2004, at Beverly Hills, California.

/s/ James B. Hicks
James B. Hicks

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

NORTH BEVERLY PARK HOMEOWNERS ASSOCIATION, INC., a California non-profit corporation, Plaintiff, vs. JEANNETTE A. BISNO, an individual; and DOES 1 through 25, Inclusive, Defendants.	Case No.: BC 275041 (Consolidated with Case No. BC 288585) [Assigned to the Honorable Rodney Nelson – Dept. 46] Complaint Filed: June 5, 2002 [~~PROPOSED~~] **JUDGMENT FOR PERMANENT INJUNCTION** (Filed Apr. 29, 2004)
ROBERT H. BISNO, Plaintiff, vs. NORTH BEVERLY PARK HOMEOWNERS ASSOCIATION, INC. and DOES 1-10, Inclusive, Defendants.	

This action came on regularly for trial on March 8, 2004 in Department 46 of the above-entitled court, Honorable Rodney Nelson, judge presiding. Plaintiff North Beverly Park Homeowners Association appeared by its attorneys Marc E. Rohatiner and Denise M. Parga of Wolf, Rifkin, Shapiro & Schulman, LLP and defendants Jeanette Bisno and Robert Bisno appeared by their attorneys, Marshall G. Mintz of Mintz & Werner and James

Hicks and Andres Quintana of Erwin, Cohen & Jessup, LLP.

Evidence, both oral and documentary having been presented by both parties, the Court having conducted a site view of the properties in question, the cause having been argued and submitted for decision, the Court having issued its Statement of Intended Decision, the Court finds that:

1. The Architectural Review Committee (the "ARC") is a duly constituted committee of North Beverly Park Homeowners Association (the "Association").

2. In undertaking the acts referred to herein,

(a) the ARC acted within the authority granted it by the Association's Declaration of Conditions, Covenants & Restrictions (the "CC&Rs"):

(b) the ARC acted in the best interests of the community and not in an arbitrary manner;

(c) the ARC followed its own standards and procedures prior to seeking injunctive relief;

(d) Those standards and procedures were reasonable.

3. Section 25.03 of the CC&Rs required the Bisnos to submit plans and specifications showing the "nature, kind, shape, height, width, color, materials and locations" of the sculpture and obtain written approval from the ARC prior to its installation in the motor court of 66 Beverly Park, Beverly Hills, California (the "Bisno property").

4. The Bisnos never submitted a writing which described the "nature, kind, shape, height, width, color,

materials and locations" of the sculpture prior to the institution of this action.

5. The Bisnos installed the sculpture in the motor court of the Bisno property in violation of the CC&Rs.

6. On April 12, 2004, in accordance with the Statement of Intended Decision, the ARC considered and disapproved the sculpture in the motor court of the Bisno Property.

7. The ARC's disapproval of the location of the sculpture in the motor court was reasonable, undertaken in good faith and not in an arbitrary or discriminatory manner and in the best interest of the community.

8. The Bisnos submitted a drawing of the main and secondary gates to the ARC.

9. On October 23, 2001 and on December 4, 2001 the ARC disapproved the gate design.

10. After the disapproval was communicated to the Bisnos, the Bisnos fabricated the disapproved gates.

11. The ARC was willing to accept the fabricated gates with modest revisions.

12. The Bisnos installed the disapproved gates without making the modest revisions.

13. On April 12, 2004, in accordance with the Statement of Intended Decision, the ARC disapproved the gates as installed and requested that the Bisnos revise the gates within sixty (60) days.

14. The revisions requested by the ARC are modest and reasonable.

15. The ARC's decision with respect to the requested revisions of the gates was reasonable, undertaken in good faith and not in an arbitrary or discriminatory manner and in the best interest of the community.

16. The Bisnos acknowledged in trial that the ARC had the authority to disapprove the Bisnos' installation and maintenance of the trash cans in the Private Streetscape area.

17. The Bisnos moved the trash cans out of the Private Streetscape area during the course of the trial.

18. Therefore, the Association's request for an injunction mandating that the Bisnos move the trash cans was moot.

19. The ARC acknowledged prior to trial that the ficus hedge in front of the dinosaur had grown to a sufficient height to screen the dinosaur and that if the hedge were maintained at that height, the ARC would accept the dinosaur.

20. As a result, the Association withdrew its request for an injunction with respect to dinosaur prior to trial.

21. The Association had requested that the Bisnos replace certain trees that were dead or dying and complete its landscape plan in the front of the Bisno property.

22. After the Association sought injunctive relief with respect to the landscaping, the Bisnos installed two of the missing trees and installed a sump pump to address the condition of the dead or dying trees.

23. Accordingly, the Association's request for injunctive relief with respect to the landscaping was moot.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Robert Bisno, Jeanette Bisno and their agents, servants, employees, and co-owners and/or anyone working with defendants Robert Bisno and/or Jeanette Bisno, and all persons acting in concert or participating with or for them are ordered to move the sculpture currently located in the motorcourt of 66 Beverly Park, Beverly Hills, California (the "Bisno property") to the backyard of the Bisno property or to another location on the Bisno property where the sculpture will not be visible from the street no later than June 11, 2004, sixty (60) days after the ARC disapproved the location of the sculpture.

2. Robert Bisno, Jeanette Bisno and their agents, servants, employees, and co-owners and/or anyone working with defendants Robert Bisno and/or Jeanette Bisno, and all persons acting in concert or participating with or for them are permanently enjoined from installing a design element in the motorcourt of the Bisno property that is not approved by the ARC.

3. Robert Bisno, Jeanette Bisno and their agents, servants, employees, and co-owners and/or anyone working with defendants Robert Bisno and/or Jeanette Bisno, and all persons acting in concert or participating with or for them are ordered to remove the main and secondary gates on the Bisno property no later than June 11, 2004, sixty (60) days after the ARC disapproved the main and secondary gates, as currently installed.

4. Robert Bisno, Jeanette Bisno and their agents, servants, employees, and co-owners and/or anyone working with defendants Robert Bisno and/or Jeanette Bisno, and all persons acting in concert or participating with or

for them are permanently enjoined from installing main and secondary gates that are not approved by the ARC.

5. The ARC and its agents, servants, employees are ordered to respond to all applications submitted by the Bisnos pursuant to Section 25.03 of the CC&Rs within 40 days of receipt.

IT IS HEREBY FURTHER ORDERED that North Beverly Park Homeowners Association is the prevailing party on the complaint and is entitled to $275,000.00 as its costs.

DATED: April 29, 2004

/s/ Rodney E. Nelson
THE HONORABLE RODNEY NELSON

Submitted by:

WOLF, RIFKIN, SHAPIRO & SCHULMAN, LLP

By: /s/ Denise M. Parga
DENISE M. PARGA
Attorneys for NORTH BEVERLY PARK HOMEOWNERS ASSOCIATION, INC.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) s.s.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 11400 West Olympic Boulevard, Ninth Floor, Los Angeles, California 90064-1582.

On April 19, 2004, I served the foregoing document described as **JUDGMENT FOR PERMANENT INJUNCTION** on the interested parties in this action by placing [ ] the original [✓] a true and correct copy thereof enclosed in an envelope addressed as set forth on the attached page.

[X] **BY MAIL.** As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

[ ] **BY OVERNIGHT EXPRESS DELIVERY.** I deposited it in a box or other facility regularly maintained by Overnite Express, or delivered it to a driver or courier authorized by Overnite Express to receive documents, in an envelope designated by Overnite Express, with delivery fees provided for, and with delivery requested for the next business day.

[X] **BY FACSIMILE.** On April 19, 2004, between the business hours of 9:00 a.m. and 5:00 p.m. and as more specifically set forth on the facsimile confirmation sheet) attached hereto, I served the foregoing document described as _____ by facsimile, from facsimile number (310) 479-1422, to the interested party(ies) in this action at the facsimile number(s) as set forth on the facsimile cover sheet(s) attached hereto. The parties hereto have agreed in writing to accept facsimile service.

Executed on April 19, 2004, at Los Angeles, California.

[X] (**State**) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[ ] (**Federal**) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

L. Henry
(print or type name)

/s/ L. Henry
(signature)

SERVICE LIST
N. Beverly Park HOA v. Bisno
LASC Case No. BC 275041

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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

NORTH BEVERLY PARK HOMEOWNERS ASSOCIATION, Plaintiff and Respondent, v. JEANNETTE A. BISNO, et al., Defendants and Appellants.	B175173 (Los Angeles County Super. Ct. No. BC275041) (Filed Jun. 21, 2005)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rodney E. Nelson, Judge. Affirmed.

Ervin, Cohen & Jessup and James B. Hicks; Mintz & Werner and Marshall G. Mintz for Defendants and Appellants.

Wolf, Rifkin, Shapiro & Schulman, Marc E. Rohatinger and Denise M. Parga for Plaintiff and Respondent.

North Beverly Park, a common interest development governed by the Davis-Stirling Common Interest Development Act (Civ. Code, § 1350, et. seq.), is a luxury community located in Beverly Hills.[1] It encompasses more than 300 acres divided into 64 residential lots. Under the

[1] All undesignated section references are to the Civil Code.

Declaration of Covenants, Conditions and Restrictions, it is managed by the North Beverly Park Homeowners' Association ("the Association"). The Architectural Review Committee ("the ARC") has discretion to approve or disapprove proposed improvements visible from the lot boundaries. In April 1999 Robert and Jeannette Bisno purchased a vacant lot in North Beverly Park, and planned to build a residence. Disputes arose over the ARC's disapproval of certain elements of the Bisnos' construction plans, and the Association ultimately filed suit against the Bisnos. Following a non-jury trial, the trial court granted a permanent injunction requiring the Bisnos to remove a sculpture and front gates that were not approved by the ARC. The Bisnos appeal, and we affirm the trial court.

PROCEDURAL BACKGROUND

On June 5, 2002, the Association filed a complaint against Jeannette Bisno alleging that she was "[t]hreatening to install a front gate on the Property" which had been disapproved by the ARC.[2] The Association alleged causes of action for breach of covenants, nuisance, and trespass, seeking damages in excess of $5,000 and

[2] During the trial court proceedings, there was some uncertainty as to the ownership status of the property. The Bisnos purchased the lot as community property. For reasons unrelated to this case, Robert Bisno later conveyed the property to Jeannette. In early 2001 the Bisnos instituted divorce proceedings, and a dispute ensued over whether Robert retained a beneficial interest in the property or whether Jeannette was sole owner. By the end of September 2002 the dispute over ownership had been resolved, with Robert Bisno as the sole owner. At times the Association's pleadings named Jeannette Bisno alone as defendant, and at times they named both Robert and Jeannette.

injunctive relief Accompanying the complaint was a certification under section 1354, subdivision (c), that preliminary or injunctive relief was necessary. On June 5, 2002, the trial court granted the Association's ex parte application for a temporary restraining order prohibiting installation of the gates. On July 11, 2002, the court granted the Association's second ex parte application for a temporary restraining order to prohibit Jeannette and Robert Bisno from pouring the concrete driveway and installing a 17 foot sculpture in their front yard without ARC approval. Following hearing on an order to show cause, the court granted a preliminary injunction on January 17, 2003, prohibiting Robert Bisno from installing the gates or sculpture without ARC approval.

In August 2003 the trial court permitted the Association to file a Supplemental Complaint against Robert and Jeannette Bisno. The complaint alleged additional disputes between the Association and the Bisnos, including the Bisnos' alleged failure to complete the approved landscaping and to relocate trash cans, and their installation of a ficus hedge around a transformer and dinosaur topiary that had not been approved.

On October 31, 2003, some ten months after issuing the preliminary injunction, the court granted the Bisnos' motion to dissolve it. However, the court's ruling advised that the court had not determined the ultimate merits of the Association's suit. Sometime after dissolution of the preliminary injunction, the Bisnos installed both the gates and the sculpture.

Trial was held March 8 (a Monday) through March 26, 2004. The Friday before the beginning of trial, the Association waived its damage claims. The Bisnos' moved for

dismissal under section 1354, subdivision (b), arguing that Association, now seeking only injunctive relief, had failed to engage in alternate dispute resolution as required by section 1354, subdivision (b). The trial court denied the motion. At the conclusion of the trial evidence, the trial court, with the parties' consent, viewed the North Beverly Park community. On April 2, 2004, the trial court filed its Statement of Intended Decision, finding that the Association did not discriminate against the Bisnos in handling their construction plans. All alleged disputes between Bisnos and the Association were moot, except the installation of the sculpture and gates. On April 29, 2004, the court entered a permanent injunction requiring the Bisnos to move the sculpture to a spot not visible from the street, and to remove the gates. The Bisnos were further restrained from installing any gates or any item in their front motor court without ARC approval. The Bisnos appeal from the judgment (order granting the permanent injunction). (Code Civ. Proc., § 904.1, subd. (a)(6).)

EVIDENCE[3]

The Association's Case

As required by the Davis-Stirling Act (see §§ 1351, subd. (h), and 1353), North Beverly Park is governed by a Declaration of Covenants, Conditions and Restrictions ("the Declaration"). The Declaration creates the ARC to review all proposed improvements visible from the boundaries of the residential lots. Because the lot lines run

[3] Although the trial evidence covered other disputes between the Bisnos and the ARC, we summarize only the evidence relevant to the two items covered by the permanent injunction: the front gates and the sculpture.

to the middle of the street, the jurisdiction of the ARC includes improvements visible from that location. The ARC has three members (all North Beverly Park homeowners), and rules by majority vote. The specific grant of authority to the ARC is contained in section 25.03 of the Declaration, which states in relevant part: "No construction, alteration, addition, installation, modification, decoration, redecoration or reconstruction of any exterior of an Improvement, or any other portion of an Improvement (including landscaping) which is visible from outside the Residential Lot boundary shall be commenced until the plans and specifications therefor showing the nature, kind, shape, height, width, color, materials and locations of the same shall have been submitted to the ARC and approved in writing by the ARC. . . . The ARC shall not approve plans and specifications submitted for its approval if it deems, in its discretion, that the installation, construction, alterations or additions contemplated thereby in the locations indicated will be detrimental to the appearance of the surrounding area of the Project as a whole, that the appearance of any structure affected thereby will not be in harmony with the surrounding structures, and that the installation or construction thereof will detract from the beauty, wholesomeness and attractiveness of the Project or the enjoyment thereof by the Members, or that the upkeep and maintenance thereof will become a burden on the Association."

Section 25.11 of the Declaration provides that the ARC's approval or disapproval must be made "on the basis of (i) aesthetic considerations and the overall benefit or detriment which would result to the Project, (ii) the Project generally, (iii) the Basic Architectural Envelope, (iv) applicable law, and (v) this Declaration. The ARC shall

take into consideration the aesthetic aspects of the architectural designs, height, size, floor area, view impairment, and placement of structures, landscaping, color schemes, exterior finishes and materials, and similar features."

Christine Hazy, President of the Association, was a member of the ARC from 1999 through 2003. At times relevant to the Bisnos' proposed construction, Nahum Lainer and Steven Fortner were also members. All three denied that the ARC treated the Bisnos any differently than other homeowners in North Beverly Park.

In September 1999, the Bisnos' residential architect, Randy Hamerly, submitted an artist's rendering of the Bisnos' proposed residence. Among other things, the rendering depicted a fountain in the front motor court. In 2001 the Bisnos' landscape architect, Daniel Weedon, submitted construction plans that, consistent with the artist's rendering, called for a fountain in the motor court. On August 9, 2001, after these plans were submitted, Robert Bisno held a meeting with his design team (residential architect Hamerly and landscape architect Weedon) at which Bisno decided to eliminate the fountain in the motor court. Instead, he intended to install a large sculpture he had purchased in Paris, where it had been on display in front of the Ritz Carlton hotel. Bisno told Hamerly that he "expect[ed] the design review committee to have an unfavorable reaction."

The sculpture was created by Belgian sculptor Olivier Strebell, and is entitled, "*A Bras Ouverts*" (translated, "With Open Arms"). At more than 5 tons, it is a large, abstract depiction of a nude woman. The subject is posed on her back, lying on a pointed rock, arms dangling toward the ground, legs raised above the body.

By August 22, 2001, Bisno had provided Hamerly photographs of the work. Hamerly realized that because of its size, the sculpture would impede large vehicle traffic traveling around the motor court. He suggested alternative locations, but Bisno insisted that the sculpture be placed in the motor court. Therefore, the motor court had to be redesigned. If Hamerly were making the decision, he would not have selected the sculpture. It was different from other statuary visible from the street at other homes in the community. On the other hand, aesthetically Hamerly saw nothing wrong with juxtaposing the modern sculpture with the traditional architecture of the Tuscan villa the Bisnos were constructing.

Hamerly knew that the ARC would have to approve the sculpture. According to the ARC members, the ARC has the authority to approve or disapprove garden statues and fountains visible from the residential boundary. In reviewing such items, the ARC is most concerned with the location and appearance of the piece. When a statue, fountain or other element is installed without approval (and hence without an opportunity for advance review), the ARC inspects it to determine whether it meets the ARC's aesthetic guidelines. If it does, the ARC approves it. If it does not, the ARC asks the homeowner to remove it. Homeowners generally comply. The ARC gives oral approvals to already-installed improvements, and deems them valid, even though the Declaration calls for written approvals.

On November 20, 2001, Weedon (the landscape architect) submitted revised plans to the ARC. At the time, the Bisnos were proposing to build into the 25-foot setback established for the front yard. The purpose of these revised plans was to show changes required by that proposal. The

revised written plans depicted modifications of the front fence, walls, gates and pilasters.[4] Weedon listed these modifications in the space on the plans bearing the title, "Revisions." In the plan drawings he also marked the changes by "deltas" and "bubbles."[5] The plans also contained a change to the front motor court. They now described a "fountain *and/or sculpture*," as opposed to the "fountain" described on the earlier plans and depicted in the artist's rendering. This change was not listed in the space for revisions, and was not marked by deltas or bubbles.

The ARC reviewed the revised plans at a meeting in November 2001, attended by Robert Bisno, Hamerly, and Weedon. The ARC found the design for the front gates too ornate in proportion to their relatively small size – that is, because the gates were relatively small compared to other gates in the community, the detail appeared more ornate than those larger gates. The ARC requested a more simplified or subtle design. Otherwise, the ARC reacted favorably.

At this November 2001 meeting, neither Robert Bisno nor his design team mentioned the change to "fountain and/or sculpture" on the revised plans. Also, because they were examining the plans for the listed modifications required by building into the setback, the members of the ARC did not notice the change, and did not request any additional information about it. In any event, the gate design had not been finalized, and one of the subjects

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[4] "Pilasters" are the structures that support the gates.

[5] Changes in architectural design plans are generally indicated by the delta sign, and marked by bubble drawings on the plans.

under discussion was whether the gates would be screened from the street. Hence, it was uncertain whether a fountain or sculpture in the motor court would be visible from the street and subject to ARC jurisdiction. As construction progresses, generally the homeowner presents the ARC with detailed proposals for observable fountains and statuary.

On December 4, 2001, the ARC gave written conditional approval to certain items on the November 20 revised plans, but disapproved the gate drawings. The ARC requested a more simplified design for the gates. The ARC did not mention installation of a sculpture or fountain.

Robert Bisno responded by correspondence dated December 7, 2001, asserting (incorrectly) that the ARC had approved the gates. Thereafter the ARC repeatedly informed him that the gates were not approved, and that he would have to submit a simplified design. On December 19, 2001, Hamerly spoke to Robert Bisno by telephone. At that time, the gates had been designed, but not manufactured. Despite the ARC's rejection of the gate design, Bisno instructed Hamerly to have Jim Casey, the construction manager, proceed immediately to have the gates fabricated and installed as designed. Bisno told Hamerly, "It would take a court order to stop us."

On May 8, 2002, the ARC's attorney sent Robert Bisno a letter stating that the ARC was still awaiting the simplified gate design. On May 10, 2002, Bisno responded by letter, requesting that the Association's entire Board of Directors review the design. Such a review would have been unprecedented. On May 17, 2002, the ARC again informed Bisno by letter that he must submit a revised

gate design. When Bisno did not do so and appeared ready to proceed with the rejected design, the Association filed suit on June 5, 2002, to prevent installation of the gates.

A month or so later, in July 2002, the ARC first learned of Robert Bisno's intent to install the sculpture. Mary Williams, the Association's on-site manager, saw a large construction crane at the Bisnos' home site. Jim Casey, defendants' construction manager, told her that a sculpture was being delivered. Williams, who had been hired only weeks before, was unable to find any written approval for a sculpture. She later drove past the site, and observed the assembled sculpture. To her it appeared to be possibly some type of sea creature. Jim Casey told her the sculpture was 18 feet high, and would be installed in front of the house.

The members of the ARC viewed the sculpture before it was installed, and disapproved it. The sculpture was the most noticeable statuary in the community. Its size was inappropriate for its placement: too large for the motor court and house, too close to the street. Further, the work was aesthetically out of character for the community, very different in style and theme from any other artistic work.

After the trial court dissolved the preliminary injunction, the Bisnos installed the sculpture and gates. They were in place at the time of trial.

Defense Case

In June or July 2001, Robert Bisno observed the sculpture on display in the Place Vendome in Paris. He purchased it for $250,000, not thinking of the ARC. He

was overcome by the beauty of the sculpture, and did not imagine that the ARC would disapprove it.

By August 2001 Bisno decided to install the sculpture in the front motor court. This placement required modifications to the design of the motor court. Based on his difficult dealings with the ARC, Bisno came to believe that the ARC would not like the sculpture. However, he never instructed his design team to conceal information about it from the ARC. He did, however, decide to install the sculpture without ARC approval, because (based on conversations with counsel) he believed that the ARC did not have jurisdiction over it. After the court dissolved the preliminary injunction, Bisno installed the sculpture, understanding that the court might later require him to remove it.

Believing that the ARC dealt unfairly with the gate design, Bisno did not intend to comply with the ARC's request for a more simplified design. He decided to install the gates, and then "see if the ARC still believes . . . these are so terrible that they are worth a lawsuit." Before he could install them, the ARC filed suit. After the preliminary injunction was dissolved, Bisno installed the gates.

Both Weedon and Hamerly believed that the Bisnos were required to obtain approval from the ARC for installation of the sculpture. It was "standard practice" to submit a photograph or thawing depicting the materials, height, and design of a visible sculpture to the ARC. However, Bisno, Weedon and Hamerly provided no submission regarding the sculpture before it was delivered.

On the revised plans of November 2001, Weedon did not use a delta to mark the change from "fountain" to "fountain and/or sculpture," because he did not consider it

to be an important modification. Also, marking revisions with deltas is a method of indicating new work to be billed to the client, something that did not apply to installation of the sculpture. Bisno never instructed Weedon to conceal information about the sculpture from the ARC.

In Weedon's opinion, the gates were consistent with the iron work on the front door of the Bisnos' residence. He believed the gates were typical of others in the community, and nearly identical to those of another home. Hamerly, too, disagreed with the ARC's assessment that the gates were too ornate for their size, or more ornate than other gates in the community.

Weedon had performed work for 11 homeowners in North Beverly Park, and had worked as a consultant for the ARC. In his experience, the ARC had never taken as long as 90 days or six months to approve or disapprove construction plans. The proposed design of the Bisnos' home and related elements was consistent with the community, yet the ARC expressed a number of objections. The Bisnos' lot was prominent in the community, in that it was quite long and fronted a main street. Therefore, the ARC paid more attention to the details of the Bisnos' design than it did for other homeowners.

According to Lee Silver, called as an expert to offer an opinion on the ARC's handling of the Bisnos' construction, the ARC's delay in approving plans was unreasonable, and its treatment of the Bisnos was inconsistent with its treatment of other homeowners.

DISCUSSION

The Grant of Authority to the ARC is Valid

The Bisnos urge us to adopt a rule requiring homeowners' associations in common interest developments to publish specific written guidelines describing the type of improvements that will be permitted. Without such guidelines, the Bisnos argue, homeowners' associations should be precluded from obtaining injunctive relief to stop proposed improvements. The Bisnos' contention is, in substance, a challenge to the facial validity of the ARC's discretion to approve or reject construction visible from the street. We conclude that California law sanctions the broad grant of authority to the ARC, and decline to adopt the Bisnos' proposed rule.

Under section 25.03 of the Declaration, any construction or improvement visible from the residential lot boundary requires written approval from the ARC. Further, "The ARC shall not approve plans and specifications submitted for its approval if it deems, in its discretion, that the installation, construction, alterations or additions contemplated thereby in the locations indicated will be detrimental to the appearance of the surrounding area of the Project as a whole, that the appearance of any structure affected thereby will not be in harmony with the surrounding structures, and that the installation or construction thereof will detract from the beauty, wholesomeness and attractiveness of the Project or the enjoyment thereof by the Members." Section 25.11 provides that the ARC's approval or disapproval must be made "on the basis of (i) aesthetic considerations and the overall benefit or detriment which would result to the Project, (ii) the Project generally, (iii) the Basic Architectural Envelope, (iv) applicable law, and (v) this Declaration. The ARC shall

take into consideration the aesthetic aspects of the architectural designs, height, size, floor area, view impairment, and placement of structures, landscaping, color schemes, exterior finishes and materials, and similar features."

In common interest developments, California law permits delegation of broad discretion to make decisions restricting the use of property. Courts review such grants of authority under a deferential standard: they are "presumptively reasonable [citation], and are enforceable 'unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit' [citation]." *(Villa De Las Palmas Homeowners Assn. v. Terifaj* (2004) 33 Cal.4th 73, 88, quoting *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 380, 382 (*Nahrstedt*); see *Dolan-King v. Rancho Santa Fe Assn.* (2000) 81 Cal.App.4th 965, 975 (*Dolan-King*); see also § 1354, subd. (a).)

In the present case, the grant of discretion to the ARC in section 25.03 of the Declaration, supplemented by the standards of section 25.11, is not "wholly arbitrary." (*Nahrstedt, supra,* 8 Cal.4th at p. 382.) That is, it bears a "rational relationship to the protection, preservation, operation [and] purpose of the affected land." (*Id.* at p. 381.) "Maintaining a consistent and harmonious neighborhood character, one that is architecturally and artistically pleasing, confers a benefit on the homeowners by maintaining the value of their properties." (*Dolan-King, supra,* 81 Cal.App.4th at p. 976.) Moreover, California law specifically authorizes common interest developments to grant a committee broad, subjective discretion to reject proposed improvements on aesthetic, artistic, or similar grounds. (*Dolan-King, supra,* 81 Cal.App.4th at pp. 976-977; *Clark*

v. Rancho Santa Fe Assn. (1989) 216 Cal.App.3d 606, 618-620 (*Clark*); see Miller & Starr, California Real Estate (3d ed. 2001) § 25:115, pp. 268-269.) There is no requirement that specific aesthetic or design criteria be promulgated. Rather, the law requires simply that "when an association determines that a unit owner has violated a use restriction, the association must do so in good faith, not in an arbitrary or capricious manner, and its enforcement procedures must be fair and applied uniformly." *(Nahrstedt, supra,* 8 Cal.4th at p. 383; see *Rancho Santa Fe Assn. v. Dolan-King* (2004) 115 Cal.App.4th 28, 37-38 *(Rancho Santa Fe Assn.)*; *Clark, supra,* 216 Cal.App.3d at p. 620.)

Nor does the grant of authority to the ARC violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit. As recognized in *Dolan-King,* California law has "long upheld . . . general covenants vesting broad discretion in homeowners associations or boards to grant or withhold consent to construction. [Citations.] This is so even when the covenants contain such broad, general approval standards as "'"conformity and harmony of external design and general quality with the existing standards of the neighborhood"'" and "'"location of the building with respect to topography and finished ground elevations"'" as long as the covenants clearly granted such discretion." *(Dolan-King, supra,* 81 Cal.App.4th at p. 977.)

The Bisnos rely heavily on an Ohio appellate decision, *Prestwick Landowners' Assn. v. Underhill* (1980) 69 Ohio App.2d 45, 49. In *Prestwick* the court invalidated a covenant requiring pre-construction approval, as applied in that case, because the offending homeowners "had no guidelines at all in submitting their plans, and the Architectural

Committee had no guidelines at all as to accepting or rejecting them. In other words, there is too great a possibility here that the consent restriction can be exercised in an arbitrary, capricious, and unreasonable manner." (*Id.* at p. 49.) This reasoning is inconsistent with the deference California law gives to pre-construction approval provisions. A "possibility" that a review committee might exercise its discretion arbitrarily is not sufficient to overcome the presumption that the delegation of discretion is reasonable. There is simply no basis in California law to adopt the reasoning of the Ohio court in *Prestwick*.[6]

The Bisnos contend that their discriminatory treatment by the ARC compared to other homeowners shows that the grant of authority to the ARC is overbroad. As discussed below, we affirm the trial court's finding that the ARC did not discriminate against the Bisnos. In any event, "[r]estrictions found in a governing land use covenant 'are evaluated for reasonableness in light of "the restriction's effect on the project as a whole," not from the perspective of the individual homeowner. [Citations.] Accordingly, courts do not conduct a case-by-case analysis of the restrictions to determine the effect on an individual homeowner; we must consider the reasonableness of the restrictions by looking at the goals and concerns of the entire development.' [Citation.]" (*Rancho Santa Fe Assn., supra,* 115 Cal.App.4th at p. 38.) Giving the ARC broad authority to reject improvements that are not in "harmony with the surrounding structures," and that "detract from

[6] Defendants also cite other out-of-state decisions. We need not discuss them. The California standard governing the facial validity of pre-construction approval provisions is clear. The grant of discretion to the ARC clearly passes muster.

the beauty, wholesomeness and attractiveness of the Project or the enjoyment thereof by the Members," reasonably serves legitimate goals of North Beverly Park homeowners.

Substantial Evidence Supports the Permanent Injunction

To withstand judicial scrutiny, the ARC's rejection of the Bisnos' gates and sculpture must be reasonable and in good faith, not arbitrary or capricious. (*Nahrstedt, supra,* 8 Cal.4th at p. 383; *Clarke, supra,* 216 Cal.App.3d at p. 620.)[7] The Bisnos contend that the ARC subjected them to unreasonable, arbitrary, and discriminatory treatment. On conflicting evidence, the trial court found to the contrary. That finding must be upheld if supported by substantial evidence. "Generally, in reviewing a permanent injunction, we resolve all factual conflicts and questions of credibility in favor of the prevailing party and indulge all reasonable inferences that support the trial court's order. [Citation.] However, where the ultimate facts are undisputed, whether a permanent injunction should issue becomes a question of law, in which case the appellate court may determine the issue without regard to the conclusion of the trial court. [Citation.]" (*Cabrini Villas Homeowners Assn. v. Haghverdian* (2003) 111 Cal.App.4th 683, 688-689.)

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[7] Effective January 1, 2005, the Legislature enacted section 1378. Subdivision (a)(2) of that section provides that a homeowners' association's "decision on a proposed change shall be made in good faith and may not be unreasonable, arbitrary, or capricious." The provision is declaratory of existing law, and does not affect the established standard of judicial review. (See West's Ann. Cal. Codes, Civ. Code, Vol. 8, 2005 Supp., p. 184, Law Rev. Comm. Comments (2004 ed.).)

To the extent the Bisnos contend that the ARC's handling of design elements other than the gates and sculpture was unreasonable and discriminatory as compared to other homes in North Beverly Park, the trial court implicitly rejected that conclusion, and the Bisnos fail to show an abuse of discretion. Moreover, the permanent injunction requires removal of the gates and sculpture. Only the ARC's handling of those elements of the Bisnos' plans are now in issue. Other matters, such house color, mailboxes, mechanical pits, and driveways, are largely immaterial as to whether the ARC acted reasonably in rejecting the design for the gates and the placement of the sculpture.

We begin with the sculpture. Substantial evidence supports the trial court's determination that the ARC acted reasonably. The ARC's decision rejecting the sculpture was based on two factors. First, the size and placement of the sculpture are inappropriate for the project design: that is, because of its large size, the sculpture is out of proportion to the motor court and the house, and too close to the street. Second, in the ARC's aesthetic judgment, the sculpture is out of character for the community. It is abstract, whereas other statuary in the development is traditional and conservative. Also, the sculpture depicts a naked woman in an unusual pose that at least one member of the ARC, Christine Hazy, found disturbing and suggestive of violence (she believed the subject is impaled on the pointed rock that forms the base). The Bisnos' own residential architect, Randy Hamerly, conceded that installation of the sculpture in the motor court required revised construction plans to accommodate traffic flow, and he proposed other locations. He also conceded that the sculpture was different from other statuary in the community. Had the

choice been his, he would not have selected the sculpture. Further, a review of the photographic exhibits depicting other statuary visible from the street reasonably supports the ARC's subjective decision that the sculpture, being entirely different from any other, is not in harmony with the community and "will detract from the beauty, wholesomeness and attractiveness of the Project or the enjoyment thereof by the Members." Thus, substantial evidence supports the trial court's conclusion that the ARC acted reasonably in disapproving the sculpture. (See *Rancho Santa Fe Assn., supra,* 115 Cal.app.4th at p. 43 [on conflicting evidence, substantial evidence standard applies to trial court's determination that Association acted reasonably].)

As for the gates, the ARC reasoned that other gates with similar designs in the community were larger, and that therefore the design of the Bisnos' gates was too ornate in proportion to their relatively small size. The ARC merely requested a more simplified or subtle design – a request first made before Robert Bisno chose to disregard the ARC's decision and have the gates manufactured and installed as originally designed. Given the ARC's broad discretion, the decision rejecting the gates and requesting a more simplified design is reasonably consistent with the appearance of other gates in the community as depicted in the trial exhibits. We also note that the trial judge viewed the community, and found no evidence of discrimination against the Bisnos. "The information obtained by this view was independent evidence that could be taken into consideration in determining the issues presented by the pleading; '[a]s independent evidence the judge's observations were of equal dignity to the other

evidence in the case; . . .' [Citation.]" (*Clark*, *supra*, 216 Cal.App.3d at p. 621.) We find substantial evidence supports a finding that the ARC acted reasonably in disapproving the gates, and merely asking for a more simplified design.

The Bisnos' contend that the ARC's application of its authority was inconsistent, because it did not always issue written approvals as required by section 25.03 of the Declaration, but rather gave oral approvals to some sculptures and fountains. The Association's evidence showed that when a statue, fountain or other element is installed without approval (and hence without an opportunity for advance review), the ARC inspects it to determine whether it meets the ARC's aesthetic guidelines. If it does, the ARC approves it, often orally. If it does not, the ARC asks the homeowner to remove it. Homeowners generally comply. This deviation from the requirement of written approvals contained in section 25.03 does not invalidate the ARC's rejection of the Bisnos' gates and sculpture. It does not show arbitrary or capricious application of the ARC's subjective discretion, but rather a procedural irregularity that in no way affected the ARC's handling of the Bisnos' sculpture and gates.

The Bisnos contend that the ARC rarely, if ever, institutes litigation against homeowners who violate use restrictions. The Bisnos believe that the instant litigation against them is evidence of discriminatory treatment. We find no evidence of arbitrary or capricious action in the filing of the present action. The event that led to this litigation was Robert Bisno's insistence on installing the gates, even though the ARC had expressly rejected the design. Despite the ARC's decision, in December 2001 Robert Bisno instructed Randy Hamerly to have Jim

Casey, the construction manager, proceed immediately to have the gates fabricated and installed as designed. Bisno told Hamerly, "It would take a court order to stop us." Bisno decided to install the gates, and then "see if the ARC still believes . . . these are so terrible that they are worth a lawsuit." Believing installation of the gates was imminent, the ARC filed suit in June 2002 to stop it. Although most homeowners accede to the ARC's request to remove improvements that do not meet ARC approval, Robert Bisno intended to disregard the ARC's decision unless stopped by court action. In this circumstance, the ARC's decision to file suit was not arbitrary or capricious.

The Bisnos Were Not Entitled to an Internal Disciplinary Proceeding

The Bisnos contend that before filing the instant action, the Association did not provide them with the notice and hearing required by section 23.01 of the Declaration. This failure, according to the Bisnos, requires us to overturn the trial court's decision. However, section 23.01 clearly did not require the Association to conduct an internal disciplinary proceeding before bringing the present court action. In relevant part, section 23.01 states: "Any dispute or question involving any action, omission, interpretation, application or enforcement of any of the provisions of this Declaration shall be determined promptly by the Board of Directors, who shall consider and weigh such written and such oral statements as may be submitted to the Board in connection therewith. Except with respect to a loss or forfeiture which may result from (i) a judgment or order of a Court of competent jurisdiction, or the ruling of any governmental agency having jurisdiction . . . the rights of the Association and/or the

Board of Directors to impose monetary penalties upon any Owner, suspend his voting rights or otherwise discipline any Owner by reason of any breach of or default by such Owner in compliance with the provisions of this Declaration . . . shall (in accordance with the provisions of Section 1792.25 of Title 10 of the California Code of Regulations and Section 7341 of the California Corporations Code) be exercised in good faith and in a fair and reasonable manner and shall require substantial compliance with the following: [¶] (i) Written notice to be given to any Owner against whom any discipline is to be taken or imposed [including a statement of reasons, provided at least 15 calendar days before the date of disciplinary action]. [¶] (ii) Not less than five (5) calendar days before the effective date of any such proposed disciplinary action, the Owner against whom such action is proposed to be taken shall be given an opportunity to be heard, orally or in writing, by the Board or other person or body authorized by the Board to decide whether or not the proposed disciplinary action is to be taken."

By its plain meaning, section 23.01 requires "substantial compliance" with the notice and hearing requirements only in instances in which the Board of Directors itself seeks to impose disciplinary action on a homeowner, as by imposing a monetary penalty or suspending voting rights. The internal notice and hearing requirements do not apply when the Board or Association, rather than imposing internal discipline, brings an action in court. Besides the plain meaning of the language used, we find further support for this conclusion by analogy to the doctrine of *noscitur a sociis,* under which the meaning of a word may be qualified by reference to the entire clause as a whole. (*Texas Commerce Bank v. Garamendi* (1992) 11 Cal.App.4th 460,

471, fn. 3.) The nature of the word "discipline" as used in section 23.01 is qualified by the specific examples preceding it – monetary penalties or suspension of voting rights – which are disciplinary penalties the Board may impose, and not the type of injunctive relief involved in the instant appeal. In addition, section 17.01 declares that, except for nonpayment of charges or assessments, "the remedy at law to recover damages [for any violation of the Declaration] is inadequate and the failure of any Owner . . . to comply [with the terms of the Declaration] . . . may be enjoined or specifically enforced by appropriate legal proceedings instituted by . . . the Association." This provision authorizing the Association to seek injunctive relief in court contains no mention of the internal hearing provisions of section 23.01, and cannot reasonably be construed to invoke them as preconditions to filing suit. Thus, the Bisnos were not entitled to a disciplinary hearing before the Association filed suit.

The Trial Court Did Not Abuse Its Discretion in Denying the Bisnos' Motion to Dismiss under section 1354, subdivision (b)

The Bisnos contend that the Association violated Civil Code section 1354, subdivision (b), by failing to pursue alternative dispute resolution before seeking injunctive relief. Therefore, the Bisnos argue that the injunction must be dissolved. We disagree.

As here relevant, Civil Code section 1354, subdivision (b), applies to a civil action brought to enforce the documents governing a common interest development, and seeking "solely . . . declaratory relief or injunctive relief, or . . . declaratory relief or injunctive relief in conjunction

with a claim for monetary damages . . . not in excess of . . . $5,000."[8] The subdivision requires that before filing such

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[8] Effective January 1, 2005, the Legislature amended Civil Code section 1354, and moved the alternative dispute resolution provisions, which it modified, to sections 1369.510 through 1369.590. (Stats. 2004, ch. 754, § 1.) We quote the relevant portions of the former statute, subdivisions (b) and (c), as they existed when the Association filed its action:

> "(b) Unless the applicable time limitation for commencing the action would run within 120 days, prior to the filing of a civil action by either an association or an owner or a member of a common interest development solely for declaratory relief or injunctive relief, or for declaratory relief or injunctive relief in conjunction with a claim for monetary damages, other than association assessments, *not in excess of five thousand dollars ($5,000),* related to the enforcement of the governing documents, the parties shall endeavor, as provided in this subdivision, to submit their dispute to a form of alternative dispute resolution such as mediation or arbitration. The form of alternative dispute resolution chosen may be binding or nonbinding at the option of the parties. Any party to such a dispute may initiate this process by serving on another party to the dispute a Request for Resolution. . . . Parties receiving a Request for Resolution shall have 30 days following service of the Request for Resolution to accept or reject alternative dispute resolution and, if not accepted within the 30-day period by a party, shall be deemed rejected by that party. If alternative dispute resolution is accepted by the party upon whom the Request for Resolution is served, the alternative dispute resolution shall be completed within 90 days of receipt of the acceptance by the party initiating the Request for Resolution, unless extended by written stipulation signed by both parties. The costs of the alternative dispute resolution shall be borne by the parties.
>
> "(c) At the time of filing a civil action by either an association or an owner or a member of a common interest development solely for declaratory relief or injunctive relief, or for declaratory relief or injunctive relief in conjunction with a claim for monetary damages not in excess of five thousand dollars ($5,000), related to the enforcement of the governing

(Continued on following page)

an action, "the parties shall endeavor, as provided in this subdivision, to submit their dispute to a form of alternative dispute resolution," which may be binding or nonbinding at the parties' option. (Civ. Code, § 1354, subd. (b).) The statute provides that either party may serve on the other a "Request for Resolution," which must be accepted or rejected within 30 days, and if not accepted within 30 days is deemed rejected. (*Ibid.*)

Under section 1354, subdivision (c), "[a]t the time of filing a civil action [described in subd. (b)] . . . the party filing the action shall file with the complaint a certificate stating that alternative dispute resolution has been completed in compliance with subdivision (b). The failure to file a certificate as required by subdivision (b) shall be grounds for a demurrer pursuant to Section 430.10 of the Code of Civil Procedure or a motion to strike pursuant to Section 435 of the Code of Civil Procedure unless the filing party certifies in writing that one of the other parties to

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documents, the party filing the action shall file with the complaint a certificate stating that alternative dispute resolution has been completed in compliance with subdivision (b). The failure to file a certificate as required by subdivision (b) shall be grounds for a demurrer pursuant to Section 430.10 of the Code of Civil Procedure or a motion to strike pursuant to Section 435 of the Code of Civil Procedure unless the filing party certifies in writing that one of the other parties to the dispute refused alternative dispute resolution prior to the filing of the complaint, that preliminary or temporary injunctive relief is necessary, or that alternative dispute resolution is not required by subdivision (b), because the limitation period for bringing the action would have run within the 120-day period next following the filing of the action, or the court finds that dismissal of the action for failure to comply with subdivision (b) would result in substantial prejudice to one of the parties." (Italics added.)

the dispute refused alternative dispute resolution prior to the filing of the complaint, *that preliminary or temporary injunctive relief is necessary,* or that alternative dispute resolution is not required by subdivision (b), because the limitation period for bringing the action would have run within the 120-day period next following the filing of the action, *or the court finds that dismissal of the action for failure to comply with subdivision (b) would result in substantial prejudice to one of the parties."* (Italics added.)

The Association commenced the present case on June 5, 2002, by filing a complaint against defendant Jeannette Bisno alleging breach of covenants, nuisance, and trespass. The complaint sought, *inter alia,* a preliminary and permanent injunction, and damages "believed to be in excess of $5,000.00 and within the jurisdictional limit of this Court." The Association also filed a certification "that, in accordance with California Civil Code section 1354(c), preliminary or temporary injunctive relief is necessary to compel Jeannette A. Bisno to comply with the Association's governing documents."

The Association's complaint did not violate section 1354, subdivision (b). Because the complaint sought damages in excess of $5,000, subdivision (b) of section 1354 did not require an attempt at alternative dispute resolution before the Association commenced the action. Further, regardless of the damage amount sought, the complaint was accompanied by a certification under section 1354, subdivision (c), that preliminary or temporary injunctive relief was necessary. Hence, on this independent ground there was no need for the Association to certify that there had been an attempt at alternative dispute resolution.

The Association was initially successful in obtaining a preliminary injunction. However, the injunction was later dissolved pending trial. In August 2003 the court granted the Association leave to file a Supplemental Complaint, which supplemented the factual allegations of the initial complaint. Trial began on Monday, March 8, 2004. On the preceding Friday, the Association decided to forego its damage claims, and proceed solely on its claims for permanent injunctive relief. Although the Association believed it had suffered monetary damages, it had decided to waive its damage claims because of the difficulty in proving how much the community had been devalued as a result of defendants' conduct. On the first day of trial, the Bisnos moved under section 1354 to dismiss the complaint because the action now sought only injunctive relief, and the Association had failed to pursue alternative dispute resolution as contemplated by section 1354, subdivision (b).[9] The trial court denied the motion.

On appeal defendants' implicitly (though not expressly) challenge this ruling. They contend, in essence, that the Association acted in bad faith in coupling its injunctive claim with a sham claim for damages in excess of $5,000 so as to avoid the alternative dispute resolution requirement of section 1354, subdivision (b). Therefore, according to defendants, upon the Association's waiver of the damage claim shortly before trial, the trial court should have dismissed the action for failure to attempt

[9] The Bisnos have failed to include a copy of their motion and supporting documents in the record on appeal.

alternative dispute resolution. We find no abuse of discretion in the trial court's denial of defendant's motion to dismiss.

First, it is the failure to file a certificate under subdivision (c) of section 1354, not the failure to attempt informal resolution under subdivision (b), that invokes the court's power to strike the complaint, or otherwise dismiss it. Here, because the Association certified under subdivision (c) that preliminary or temporary injunctive relief was necessary, there was no need to certify completion of alternative dispute resolution, and, in turn, there was no basis under subdivision (c) for the trial court to strike or otherwise dismiss the complaint. Thus, whether the damage claim was brought in bad faith was irrelevant under section 1354; the certification of the need for preliminary or temporary injunctive relief precluded dismissal of the case.

Second, assuming *arguendo* the Bisnos might have been entitled to dismissal upon a showing the Association made its damage claim in bad faith, the Bisnos fail to cite any evidence in the record proving such bad faith. Although in the proceedings below the Bisnos' attorney referred to excerpts from the deposition of Christine Hazy, apparently cited in defendants' written motion, defendants have failed to make the motion and the supporting deposition testimony part of the record on appeal. Moreover, even if we accept trial counsel's characterization of that deposition testimony, it is insufficient to show that the Association acted in bad faith in alleging damages in excess of $5,000. The trial court could reasonably conclude that the Association believed in good faith that defendant's alleged violations of the covenants caused the community more than $5,000 in damages from the diminution in the

value of the community. The court could also reasonably conclude that the Association's decision shortly before trial not to pursue damages was simply a practical choice to simplify and streamline the trial.

Finally, section 1354, subdivision (c), permits the court to excuse the requirement of certifying compliance with subdivision (b) if "the court finds that dismissal of the action for failure to comply with subdivision (b) would result in substantial prejudice to one of the parties." Given the efforts at mediation after the case had been filed, and the great expenditure of time and effort over the course of the litigation, the trial court could reasonably conclude, as argued in the trial court proceedings below by the Association's counsel, that dismissal would have substantially prejudiced the Association without serving the goals of the statute.

The Sculpture Was Not Impliedly Approved

The Bisnos contend that the ARC failed to rule on their plans calling for a "fountain and/or sculpture" within 45 days of submission. Therefore, under sections 25.03 and 25.07 of the Declaration, the plans for a sculpture or fountain must be deemed to have been approved. We disagree.

Section 25.03 provides in relevant part: "The ARC shall consider and act upon any and all plans and specifications submitted for its approval under this Declaration. . . . No construction, alteration, addition, installation, modification, decoration, redecoration or reconstruction of any exterior of an Improvement, or any other portion of an Improvement (including landscaping) which is visible from outside the Residential Lot boundary shall be commenced

until the plans and specifications therefor *showing the nature, kind, shape, height, width, color, materials and locations of the same shall have been submitted to the ARC and approved in writing by the ARC....* The ARC may require such detail in plans and specifications submitted for its review as it deems proper, including, without limitation, landscape plans, floor plans, site plans, drainage plans, elevation drawings (including but not limited to considerations with respect to the impairment of the applicant's or other Lot Owner's or adjacent Lot Owner's view) and description or samples of exterior materials and colors. Decisions of the ARC and the reasons therefore shall be transmitted by the ARC to the applicant ... within forty-five (45) days after receipt by the ARC of all materials required by the ARC. *Any application submitted pursuant to this Section 25.03 shall be deemed approved, unless written disapproval or a request for additional information or materials by the ARC shall have been transmitted to the applicant within forty-five (45) days after the date of receipt by the ARC of such application or additional information."* (Italics added.)

Section 25.07 additionally provides: "If *complete plans and specifications* are submitted as provided herein and the ARC fails to approve or disapprove the same within forty-five (45) days from receipt thereof by the ARC, the plans, specifications and drawings so submitted shall be deemed to have been approved in writing by the ARC." (Italics added.)

We find that the implied approval provisions of section 25.03 and 25.07 did not apply to the Bisnos' sculpture. Reasonably construed, the implied approval provisions of sections 25.03 and 25.07 do not apply unless complete plans for the improvement in issue – that is, plans "showing the

nature, kind, shape, height, width, color, materials and locations of the same" – have been submitted. Any contrary interpretation would render the description of the type of plans required in section 25.03, and the reference to "complete plans" in section 25.07, mere surplusage. The Bisnos fail to offer any real argument on the interpretation of sections 25.03 and 25.07.

The Association's evidence showed that complete plans for the sculpture were never submitted. Further, the Association had no opportunity to view the sculpture (or any depiction of it) before it was delivered to the job site in July 2002. Thereafter the ARC promptly inspected it, and disapproved it. The Bisnos' summary of the record in [sic] inaccurate. There is no "unequivocal" testimony that the Bisnos submitted plans showing a "fountain and/or sculpture" as early as February 18, 2001. There is no "uncontroverted" testimony that Robert Bisno and Daniel Weedon showed a photograph of the sculpture to the ARC before the submission of plans showing a "fountain and/or sculpture." None of the Bisnos' citations to the record support these assertions. Indeed, Daniel Weedon testified that before the sculpture was delivered he did not present a photograph to the ARC, and he did not know whether the ARC had a chance to see a photograph of the sculpture before that time. He further testified that it was possible he and Robert Bisno showed a photograph to the ARC after July 2002. Substantial evidence clearly supports the trial court's finding that the implied approval provisions of sections 25.03 and 25.07 did not apply to the Bisnos' sculpture.

ARC Approval of the Sculpture Was Required

The Bisnos' contend that the sculpture is not an "Improvement" within the meaning of the Declaration, and therefore the ARC had no jurisdiction over it. We find that the Bisnos have waived the contention. The issue was not raised in the Bisnos' opening statement at trial. The Bisnos have provided us with no record showing that this claim was made at any other time at trial, as in trial briefing or argument. The only mention of the issue in the appellate record occurs in the Bisnos' Request for a Statement of Decision. That request was made after the trial court issued its Statement of Intended Decision. True, at trial Robert Bisno testified that he decided to install the sculpture without ARC approval, because (based on conversations with counsel) he believed that the ARC did not have jurisdiction over it. However, that testimony is not adequate to show that the Bisnos articulated a coherent argument that ARC approval was not required. Having failed to adequately articulate the argument at trial, and thus having deprived the Association and the trial court of a fair opportunity to address it, the Bisnos have waived the right to assert it on appeal. (See generally *Curcio v. Svanevik* (1984) 155 Cal.App.3d 955, 960.)

Assuming *arguendo* that the Bisnos did not waive the argument, we are not persuaded on the merits. Section 25.03 of the Declaration provides in relevant part that "[n]o . . . decoration [or] redecoration . . . of any exterior of an Improvement, or any other portion of an Improvement (including landscaping) which is visible from outside the Residential Lot boundary shall be commenced until" the ARC approves the plans. Section 1.21 defines "Improvement" in part as "any structure or appurtenance thereto of every type and kind, including, but not limited to, buildings, . . .

driveways, parking areas, ... and landscaping of all Landscape Categories."

The plain meaning of sections 25.03 and 1.21 shows that the ARC has jurisdiction over the sculpture. As a building, the Bisnos' home is an "Improvement" within the meaning of section 1.21. Further, as a driveway and parking area, the motor court is likewise an "Improvement." Under section 25.03, any "decoration ... of any exterior of an Improvement, or any other portion of an Improvement (including landscaping) which is visible from outside the Residential Lot boundary" must be approved by the ARC. The sculpture qualifies as "decoration" of the exterior of the home, and a "decoration" of the motor court. Indeed, it was the beauty and scale of the five-ton sculpture, and its theme of welcoming visitors to the home, that led Robert Bisno to decide to install it. Thus, section 25.03 clearly gave the ARC jurisdiction over the sculpture.

The trial evidence supports such an interpretation. The Association's evidence showed that section 25.03 has always been construed by the ARC and homeowners as requiring approval for statuary visible from the street. Indeed, defense witness Daniel Weedon, who had performed design work for 11 homeowners in North Beverly Park, believed that ARC approval was required for the sculpture, as did Randy Hamerly. Such evidence supports an interpretation of sections 25.03 and 1.21 that gives the ARC jurisdiction over the sculpture. In short, even if we assume for the sake of argument that the Bisnos did not waive the argument, it is clear that the ARC has jurisdiction over the sculpture.

DISPOSITION

For the foregoing reasons, the judgment is affirmed. The Association is entitled to its costs on appeal.

NOT TO BE PUBLISHED

WILLHITE, JR., J.

We concur:

EPSTEIN, P.J.

CURRY, J.

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(3)

No. 07-144

IN THE

Supreme Court of the United States

JEANNETTE A. BISNO AND ROBERT H. BISNO, INDIVIDUALLY; AND DOES 1 THROUGH 25, INCLUSIVE, PETITIONERS

v.

NORTH BEVERLY PARK HOMEOWNERS ASSOCIATION, INC., A CALIFORNIA NON-PROFIT CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEALS

REPLY BRIEF

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INTRODUCTION

Respondent North Beverly Park Homeowners Association ("Association") urges in its Opposition to the Petition of Jeannette and Robert Bisno (the "Bisnos") that this case supposedly presents "a factually unique situation that is essentially of importance only to Petitioners," and that does not present a real constitutional issue. But the issue presented by the Petition -- the right to a fundamentally fair tribunal -- is the very essence of due process, and since the proceedings below leave intact a published opinion which unfairly and erroneously denies access to a fair tribunal, it will also affect both future cases and public confidence in our judicial system.

Respondent Association does not challenge the recent medical studies cited in the Petition. The increasing impact of Alzheimer's and other dementia diseases on the judiciary is as statistically inevitable as its alarming rise in the general population. The issue of whether a litigant is constitutionally entitled to a mentally competent judge -- including a reasonable right to discover information about when mental disease may have first manifested itself -- is squarely before the Court in this petition.

The record shows that a descending cloud of mental impairment quite likely tainted the Bisnos' constitutional right to a fair tribunal. Some fifty other cases tainted by the mental impairment of Judge Nelson, without question or argument, were offered remedy by the Los Angeles County Superior Court. However, the Bisnos' basic due process rights were trampled for the expediency of avoiding retrial, or to avoid having to grapple with "the can of worms" of judicial officer privacy.

The Bisnos specifically and timely raised these constitutional issues before the California trial and appellate courts. The appellate court simply avoided the issue by erroneously re-characterizing the original interlocutory appeal as an appeal from a "final judgment." But this case

was not finally adjudicated at the time of appeal, and it remains so today.

It is undisputed that the trial judge suffered a mental illness – the California Commission on Judicial Performance started proceedings to remove him – and there was sufficient evidence to order retrial, or at least to allow discovery to determine if the onset of mental disease occurred at a time when it may have tainted the original trial. The refusal of the California courts to do so offends basic constitutional due process precepts.

This Court decides the hard cases, including cases where an important constitutional issue is squarely presented. As this Court indicated in *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1953), avoidance of a constitutional issue may constitute evasion of this Court's responsibility. For this reason, the Petition for Certiorari merits consideration by this Court to provide national guidance on this critical issue concerning state judicial tribunals.[1]

ARGUMENT

I. This Court's Jurisprudence Regarding Judicial Officer Bias And Conflict Of Interest Counsels That The Mental Incapacity Of A Judicial Officer Should Be Liberally Remedied To Maintain The Public's Confidence In Its Judiciary

The competence of a judge is no less important than any other factor affecting the fairness of a bench trial. The Petition at page 17 sets forth representative cases of this Court's robust case law regarding judicial officers with bias

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[1] The Bisnos are aware that several bar and justice advocacy organizations are interested in this significant administration of justice issue and are considering filing motions to file amicus curiae briefs. Such motions are likely to be made no later than mid-October.

or conflicts of interest. In cases like *Tumey v. Ohio*, 273 U.S. 510, 522 (1927); *In re Murchison*, 349 U.S. 133, 136 (1955); and *Ward v. Village of Monroeville*, 409 U.S. 57, 61 (1972), this Court has heavily drawn the line in favor of preserving the public's confidence in the judicial system if there is possible bias or conflict of interest.

The public policy underlying this line of cases is indistinguishable from cases where mental incapacity may have impaired a judicial officer. Decisions not yet final and made under such disability must be set aside and retried – and this Court's province is balancing the constitutional interests. Allowing states to operate judicial systems where decisions likely tainted by mental incapacity of a judicial officer remain standing offends the United States Constitution's 14th Amendment Due Process Clause.

II. The Association Makes A Red Herring Argument About Finality Issues And Its Contention That The Permanent Injunction Order Became Final Upon Remittitur Is Factually And Legally Unsupported.

The Association's Opposition says the injunction order supposedly constituted a final judgment rather than an interlocutory order, but that argument is not only irrelevant to the issues presented by this Petition, it is factually inaccurate.

The Statement of the Case in the Petition accurately summarizes the state of the record: *The first appeal was interlocutory because the case was not fully adjudicated in the state trial court, and so the Bisnos timely objected to Judge Nelson's mental incapacity under the California disqualification statute.* The Association's Opposition objects to this Petition on technical procedural grounds by falsely portraying the first appeal as taken as an appeal of a final judgment instead of an interlocutory appeal of the grant of the permanent injunction.

A. The Supplemental Statement Of The Case, Set Forth In Detail Below, Establishes That The First Appeal Was Interlocutory And Not Taken From A Final Judgment.

The Association's Statement of the Case is misleading. While it accurately points out that the Bisnos' cross-complaint was dismissed prior to entry of the judgment granting the permanent injunction, the Association does not disclose to this Court the existence of the still-pending consolidated complaint for breach of fiduciary duty. This complaint was a separate lawsuit filed by the Bisnos against the Association and it was consolidated into this case.[2] Therefore, the record clearly establishes the interlocutory character of the first appeal, despite the efforts of the Association to conceal that fact from this Court.

B. California Case Law Establishes That No Injunction Is Final If There Is A Change Of Circumstances, Law, Or Other Grounds For Which Justice Demands Modification Or Dissolution.

Even if the grant of an injunction is subjected to appellate review in California, state law establishes that a permanent injunction, granted in equity, is always subject to modification or dissolution for good cause. Cause for modification or dissolution of an injunction includes a material change of circumstances, a change in the law, or other ground in which justice demands modification or dissolution of the "permanent" injunction. *See Crespin v. Shewry*, 125 Cal.App.4th 259, 269 (2004). Thus, even if the appeal of the original injunction were somehow "final," change or dissolution of the injunction based upon changed

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[2] The procedural details are below in the Supplemental Statement of the Case.

circumstances or other grounds that justice demands is always possible.

SUPPLEMENTAL STATEMENT

This case had three operative pleadings.[3] The Association initiated this lawsuit (Los Angeles Superior Court Case No. BC 275 041) for monetary damages and injunction against the Bisnos. (Appellant's Appendix at pp. 1-7.)[4] The Bisnos filed a cross-complaint that would have required a jury trial.[5] In addition, Bisnos filed a separate lawsuit (Los Angeles County Superior Court Case No. BC 288 585) against the Association for monetary damages arising out of alleged breaches of fiduciary duty.[6] The separate lawsuit was consolidated into this case.

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[3] Because none of the operative pleadings were at issue in the first appeal of the injunction or the second appeal over the disqualification of Judge Nelson, only the original complaint is in the appellate appendices. The other documents remain in the files of the Los Angeles County Superior Court. The court docket and pdf scans of the files are available for viewing online at http://www.lasuperiorcourt.org/civil/ by going to the "Case Summary" page and entering the case number "BC 275 041" or the consolidated case number 'BC 288 585". While viewing the docket online is free, there is a charge for viewing and printing documents. Therefore, pursuant to Supreme Court Rule 32(3), Petitioner's counsel is concurrently filing a letter to the Court proposing to lodge copies of these trial court operative pleadings that were not contemplated as relevant by the parties until the California Court of Appeal erroneously re-characterized the first appeal as taken from a final judgment.

[4] Hereinafter citations to the Appellant's Appendix shall be "(A.A. at p. ___.)"

[5] The third amended cross-complaint and supplemental complaint, an operative pleading until dismissed on April 5, 2004, is viewable online and is proposed for lodging with this Court as set forth in footnote 3, *supra*.

[6] The existence of the consolidated case also is noted in two places in the appendix of the Opposition filed by the Association. See Opposition,

On the eve of the trial, the Association waived all of its monetary damages claims leaving only the injunctive relief claim for a bench trial. (Respondent's Brief, First Appeal at p. 8.)[5] On the day the bench trial began, counsel for the parties and Judge Nelson had this exchange:

> Mr. Hicks: Your Honor, also before the opening statement starts, I just want to make sure we all know the scope of this trial. I understood and so did my co-counsel from your ruling last Friday that first there would be a trial of the Association's complaint.
> The Court: Right.
> Mr. Hicks: Then there would be a separate trial on the brief (sic) of fiduciary duty claim. And then there would be a separate trial on the jury issues. I just want to make sure that that's . . .
> The Court: I think that's right.
> Ms. Parga: Yes, your Honor.
> (Respondent's Appendix, Second Appeal, pp. 107-108.)

As set forth in the Petition's Statement, the trial court, after a bench trial, granted a permanent injunction against the Bisnos.

On April 5, 2004, the Bisnos dismissed their cross-complaint filed in this case, ***but not the consolidated complaint for breach of fiduciary duty***. (Opposition, App. at pp. 1a-5a.) On June 30, 2004, the trial court entered a minute order resolving a matter of costs and attorneys fees and,

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App. at pp. 1a & 6a. The consolidated first amended complaint for breach of fiduciary duty, an operative pleading still awaiting trial, is viewable online and is proposed for lodging with this Court as set forth in footnote 3, *supra*.

[5] The Respondent's Brief, First Appeal, is in the appellate record of the California Court of Appeal under appellate case number B 175173.

aware that notice of appeal had been filed regarding the permanent injunction order, the trial court ordered that the "cross-complaint" be stayed until disposition of the appeal on the permanent injunction.[6] (Appellant's Petition for Rehearing Before the California Court of Appeal, Second Appeal and Appellant's Motion to Augment the Record, Second Appeal.)

On July 6, 2004, Bisnos filed a Notice of Appeal of the injunction order under California Code of Civil Procedure section 904.1(a)(6) that allows immediate appeals of the grant or denial of injunctions. (App., *infra*, 1sa.)[7] Due to the remaining pending matters in the trial court, the Notice of Appeal was not and could not be taken under California Code of Civil Procedure section 904.1(a)(1) which allows appeals only from final judgments.

During appellate briefing of the first appeal, ***before it was an issue in this case***, counsel for the Association concluded her Statement of the Case in the Respondent's Brief as follows:

> "Appellants' complaint for breach of fiduciary duty, which had been consolidated with Respondent's action, remains to be tried." (Respondent's Brief, First Appeal at p. 10.)

Thus, the Respondent Association itself correctly stated the interlocutory nature of the appeal in the Procedural

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[6] Although Judge Nelson ordered that trial of the "cross-complaint" be stayed until resolution of the appeal of the injunction, at the time of his June 30, 2004 minute order, the actual cross-complaint had been dismissed by the Bisnos. As the consolidated complaint is of the nature of a cross-complaint once consolidated into the Association's case, the parties clearly understood that Judge Nelson, in using the term "cross-complaint" in the minute order, was referring to the still-pending complaint for breach of fiduciary duty.

[7] The Appendix to this Reply will be cited as "(App., *infra*, __sa.)

Background section of its own brief during the original appeal. Ultimately, the Court of Appeal issued an opinion affirming Judge Nelson's order. (Opposition App. at 14a-47a.) However, at that time, none of the parties or the Court of Appeal was aware of Judge Nelson's medical condition.

The decision of the Court of Appeal accurately summarized the resolution of the Association's complaint, including a statement that at the time of the trial court's Statement of Intended Decision, "[a]ll alleged disputes between Bisnos and the Association were moot, except the installation of the sculpture and gates."[8] (Opposition, App. at p. 17a.) The Court of Appeal decision also accurately identified that appeal as taken under only California Code of Civil Procedure section 904.1(a)(6). (*Id.*) The Court of Appeal's opinion had no discussion of the dismissal of the Bisnos' cross-complaint or the pending consolidated first amended complaint for breach of fiduciary duty.

After the California Supreme Court denied discretionary review of the Court of Appeal's decision, the first interlocutory appeal went back down to the trial court on remittitur. It was soon thereafter that counsel for Bisnos learned from another attorney that the State Commission on Judicial Performance had commenced proceedings to remove Judge Nelson from the bench for degenerative brain disease, that Judge Nelson was absent from Department 46 on administrative leave, and that statements of disqualification filed in other cases were resulting in the Los Angeles County Superior Court reassigning cases and rehearing matters. (A.A. at pp. 492-493.)

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[8] As the first appeal only concerned the trial over the Association's complaint, the Court of Appeal's conclusion that all disputes were moot except the installation of the sculpture and gates was accurate as to only the trial of the Association's complaint for injunctive relief. The consolidated complaint for breach of fiduciary duty remained to be tried.

Before the lifting of the stay imposed on June 30, 2004 on the basis of the pending consolidated first amended complaint for breach of fiduciary duty, or commencement of trial of that complaint, or entry of any final judgment in the case, Bisnos filed a statement of disqualification under the California statute, filed a motion to dissolve the previous injunction on the ground that Judge Nelson was likely mentally incapacitated at the time of trial, and the matter came on for hearing before a newly-assigned judge. (A.A. at pp. 441- 609.)[9]

When the new judge denied relief, the Bisnos appealed the trial court's refusal to dissolve the injunction on the basis of the timely statement of disqualification and other evidence of potential mental incapacity at the time of trial. (App., *infra*, at pp. 2sa – 3sa.) Because the breach of fiduciary duty complaint remained pending and the matter stayed, appeal was again taken under California Code of Civil Procedure section 904.1(a)(6). (*Id.*)

On second appeal, significantly, Respondent Association dropped from the procedural statement of the case in its Respondent's Brief any mention of the pending complaint for breach of fiduciary duty. (Respondent's Brief at pp. 4-7.) And later in the same brief, the Association contended, with citation to no legal authority whatsoever, that the Bisnos' statement of disqualification was untimely because it was filed after appeals had been exhausted and "after the judgment became final." (*Id.* at p. 20.) This claim of the Association was without factual foundation in the

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[9] The Association's Opposition relies heavily on the fact that Bisnos did not raise concerns about Judge Nelson's mental capacity during the first appeal. While it was highly unusual for Judge Nelson to change his mind twice over enjoining construction of the Bisnos' improvements, only when Bisnos' counsel later learned of his probable mental incapacity did counsel realize the odd behavior had a biological basis. The disqualification was then immediately filed.

record since it had previously conceded that the breach of fiduciary duty claim "remains to be tried."

Nonetheless, at oral argument, the Court of Appeal seized upon the final judgment idea, making it a crucial basis for its conclusion that the second appeal was an appeal from a "post-judgment" order. (Petition App. at p. 2a and 29a.) Despite the efforts of Bisnos' counsel to explain at oral argument that the there was no final judgment, the Court of Appeal issued a published decision relying upon its re-characterization of the second appeal as made under California Code of Civil Procedure section 904.1(a)(1) and (a)(6). (*Id.* at p. 29a.) This was impossible, as the Bisnos could not appeal under section 904.1(a)(1) with the complaint for breach of fiduciary duty still pending.

The Court of Appeal denied the Bisnos' Petition for Rehearing that specifically pointed out that the trial court had stayed the case until the outcome of the appeal. The California Supreme Court denied review and de-publication. (Petition App. at p.34a.) Thus, there remains standing a published California opinion stating that a bench trial ruling by a likely mentally impaired judicial officer cannot be remedied.

CONCLUSION

The Petition for Certiorari should be granted to enable review of this nationally and constitutionally significant issue.

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Case No. BC 275 041
(Consolidated with Case No. BC 288 585)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

NORTH BEVERLY PARK HOMEOWNERS ASSOCIATION, INC.,

v.

JEANNETTE A. BISNO, et al.,

NOTICE OF APPEAL FROM INJUNCTION; EXHIBIT

Defendants Robert H. Bisno and Jeanette A. Bisno hereby appeal from the Court's Injunction dated May 7, 2004, a copy of which is attached as Exhibit "A", and from all related rulings and orders, including without limitation the Court's Orders dated June 16 and 30, 2004, which awards attorney's fees and costs in connection with such injunction. See generally CCP Sec. 904.1(a)(6)(allowing immediate appeal from order granting or denying injunction).

Dated: July 6, 2004

Case No. BC 275 041
(Consolidated with Case No. BC 288 585)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

NORTH BEVERLY PARK HOMEOWNERS ASSOCIATION, INC.,

v.

JEANNETTE A. BISNO, et al.,

NOTICE OF APPEAL FROM INJUNCTION; EXHIBIT

NOTICE OF APPEAL FROM ORDER DENYING MOTION TO VACATE INJUNCTION

***

Defendants Jeannette A. Bisno and Robert H. Bisno ("Defendants") or "the Bisnos") hereby appeal from the Court's denial of their motion to vacate injunction entered on or about January 13, 2006, which denial resulted from the Court's vacating the hearing date on the Bisnos' Motion To Vacate Injunction calendared for January 17, 2006 without reassigning a new hearing date and without continuing the existing stay of enforcement of injunction order, originally issued on December 8, 2005, and from all related rulings and orders. See Code of Civil procedure Sec. 904.1(a)(6)(allowing appeal from "...an order granting or dissolving an injunction, or refusing to grant or

dissolve an injunction."

The Bisnos reserve their right to re-file or recalendar their Motion to Vacate Injunction or to take other appropriate action before the trial court, after this matter is reassigned to a different trial judge. See Allstate Ins. Co. v Orlando (1968) 262 Cal.App.2d 858, 868 (allowing case to continue despite pending injunction appeal). In the meantime, the pending mandatory injunction is stayed pending this appeal. See Palmco Corp. v. Superior Court (1993) 16 Cal.App.4th 221, 224; 9 Witkin, California Procedure (4th Ed), Appeal, Sec. 276, p.320

Dated: January 17, 2006